APPENDIX

OPINIONS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16128

UNITED STATES OF AMERICA ex rel.
EDGAR H. SMITH, *Appellant*,

v.

HOWARD YEAGER, Warden, New Jersey State Prison
at Trenton

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued May 4, 1967

Before STALEY, *Chief Judge*, BIGGS and
HASTIE, *Circuit Judges*.

Opinion of the Court

(Filed January 2, 1968)

PER CURIAM.

This is an appeal from the denial of appellant's writ of habeas corpus by the United States District Court for the District of New Jersey. This court fully considered all the points now raised by appellant on the occasion of his first appeal to this court, United States ex rel. Smith v.

New Jersey, 322 F.2d 810 (C.A.3, 1963), and we consider that opinion dispositive.

Appellant, however, urges that his rights must now be considered in the light of Townsend v. Sain, 372 U.S. 293 (1963). The short answer to this contention is that the entire court considered this proposition on the first appeal. Townsend v. Sain was decided after the argument on Smith's first appeal, but before the case was decided and before the denial of Smith's petition for rehearing en banc by the majority of the entire court. Indeed, one of Smith's bases for requesting rehearing en banc was that Townsend v. Sain required this court to remand the case for a plenary hearing, and Smith's petition recites that "When Townsend v. Sain was decided, after the oral argument of this case, counsel advised this court by letter that appellant would rely on that case with regard to his right to a full hearing." Thus both the original panel and the entire court considered the application of Townsend v. Sain to this case on the first appeal.

Moreover, it is clear that Townsend v. Sain is simply not relevant to this case now, nor was it on the first appeal because Smith was offered an evidentiary hearing on the first petition for a writ in the district court, and he rejected the offer. The record of this proceeding shows that the district court was very concerned that the record before it be full and complete and that Smith have every opportunity to put in the record all that he thought essential:

> THE COURT: "Let me say this. There may have been some misunderstanding on our last discussion, but it was my thought, and I think I initiated the idea that I didn't want counsel on the side of the defendant, or the side of the state or anybody involved in this case feeling dissatisfied with the state of the record; that I wanted this record to be as complete as you thought it should be. * * * I just wanted everybody to be satisfied that they had, so far as they were concerned, this

record in complete form so that here and later and wherever you may go, whoever takes the initiative of going from here to somewhere else would not be called upon to argue that this is incomplete and this matter really hasn't been heard as yet."

Later on in the same proceedings, Smith's then- attorney stated:

> "*The United States Supreme Court says your Honor may hold a hearing de novo if need be to go into the historical facts behind this case. I don't think it is necessary here.* I think if your Honor limits himself to the record, I think that the error, the fundamental constitutional error in this case is so overwhelming that I need not stand here and argue this case at any great length.
>
> "Now, if we understand each other, so there will be no mistake about it, we rely solely and wholly upon this amendment and supplemental petition your Honor now has before you with the exceptions that I noted at my last appearance of Exhibit C attached to the original petition, which is the excerpts of the statutes. * * * With that addition, I say we rely solely upon this amended and supplemental petition. * * *" (Emphasis supplied.)

Thus there can be no doubt that the district court offered, and Smith's counsel rejected, an evidentiary hearing.

The order of the district court will be affirmed.

BIGGS, *Circuit Judge dissenting.*

On consideration of the facts of the case at bar and what I deem to be the applicable law I must respectfully dissent.

Statement of Facts

The relator-appellant Smith, convicted of murder in the first degree and sentenced to death, for the second time in this court seeks release by a federal writ of habeas corpus. A brief history of the protracted litigations involving Smith is set out below.[1] These litigations will be referred to at greater length hereinafter.

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[1] Smith's conviction was affirmed by the Supreme Court of New Jersey. State v. Smith, 27 N.J. 433, 142 A.2d 890 (1958). A petition for habeas corpus was dismissed by the United States District Court apparently for failure to exhaust state remedies. Smith did not apply immediately for certiorari to the Supreme Court of the United States but moved for a new trial chiefly on the ground of newly discovered evidence. The motion was denied, and the denial was affirmed by the Supreme Court of New Jersey. State v. Smith, 29 N.J. 561, 150 A.2d 769 (1959). Certiorari was denied by the Supreme Court of the United States, 361 U.S. 861 (1959). Smith again sought habeas corpus in the United States District Court for the District of New Jersey. The writ was denied. U.S. ex rel. Smith v. New Jersey, 201 F.Supp. 272 (D.N.J. 1962). This court affirmed, 322 F.2d 810, Circuit Judge Ganey dissenting. A petition for rehearing before this court en banc was filed and was denied by a 5 to 2 decision, Judge Ganey and the present writer dissenting. The Supreme Court denied certiorari, 376 U.S. 928 (1964), Mr. Justice Douglas dissenting. The petitioner then filed a Petition for Post-Conviction Relief which was denied by the Bergen County Court on April 17, 1964 and that denial was affirmed by the New Jersey Supreme Court. State v. Smith, 43 N.J. 67, 202 A.2d 669 (1964). The Supreme Court denied certiorari, 379 U.S. 1005 (1965), reh. denied, 380 U.S. 938 (1965). A subsequent Petition for Habeas Corpus was denied by the Bergen County Court on March 29, 1965 and leave to appeal was denied by the New Jersey Supreme Court on April 13, 1965. A further Petition for Reconsideration was denied on June 22, 1965. Thereafter, on July 13, 1965, the present, the Second Petition for a Writ of Habeas Corpus was filed in the United States District Court for the District of New Jersey and was denied as was an Application for Reconsideration. The appeal at bar followed. State Court remedies have been exhausted.

A fifteen year old girl, Vickie Zielinski, was brutally murdered under circumstances which tended heavily to incriminate Smith. Her body was found about 9:20 A.M. on March 5, 1957, in a deserted area known as the "Sand Pit" in Bergen County. About 11:30 P.M. on March 5, police arrested Smith on information supplied by Gilroy who had loaned an automobile to Smith. On the night of March 5, Smith went to bed at 7 P.M., but at 7:30 P.M. his wife wanted to visit her mother's house in Ridgewood. Smith went to bed again at approximately 10 P.M. at the Ridgewood house and soon fell asleep. He was awakened by the police and taken to the police headquarters in the Township of Mahwah. The record shows that Smith had no sleep from about 8:30 A.M. on the morning of March 5 until about 3:45 P.M. on March 6, 1957, a period of about 31 hours with the exception of perhaps an hour and a half on March 5. About 10 A.M. on March 6 he broke down, cried, and asked for a Catholic priest. At this time the police had possession of the car that Smith used on the night of the crime which contained a blood-stained mat. The police also had obtained Smith's shoes and socks worn by him on the night of the murder and an admission from him that he was at the scene of the crime with Zielinski and also that he had given her "a good shot", a strong blow. Smith was not informed of his right to remain silent, of his right to counsel, or that anything he said might be used against him. I will discuss Smith's allegations as to his treatment by the police at a later point in this opinion. See note 12, *infra*. Smith was not formally charged with murder at the time of this interrogation but it is clear that he was vehemently suspected.

In Smith's statement, as transcribed, appear many incriminating facts. Although he did not categorically admit that he had killed Zielinski his statement in substance constituted a confession. Shortly thereafter he was indicted on a charge of first degree murder. About five days after the interrogation and after indictment, deLisle, a police

detective, came to Smith in jail and asked him to sign a transcript of his statement, some 39 pages in length, which the reporter had transcribed from his notes. Smith had employed counsel at some date not clear from the record but prior to deLisle's visit. Smith refused to sign the transcript, informing deLisle that his counsel had advised him not to do so. deLisle asked Smith to read the statement, however, and later drew from him an admission of its correctness. Under the law of New Jersey it is unnecessary that an accused sign a confession to make it valid, only that he read it and acknowledge its correctness. State v. Cleveland, 6 N.J. 316, 327-30, 78 A.2d 560, 565-67 (1951). Smith testified at his trial that he was not mistreated. Issues relating to the voluntariness of Smith's statement and his admission of its correctness will be dealt with at greater length at a later point in this opinion.

Smith was found guilty of first degree murder and since there was no recommendation of life-imprisonment he was sentenced to death as required by the law of New Jersey. An appeal was taken from the judgment of conviction to the Supreme Court of New Jersey, which affirmed. State v. Smith, 27 N.J. 433, 142 A.2d 890 (1958).[1] Smith made no immediate application for certiorari, but moved for a new trial principally on the ground of newly discovered evidence.[2] His motion was denied and the denial was affirmed by the Supreme Court of New Jersey, 29 N.J. 561, 150 A.2d 769. Smith then petitioned for certiorari which was denied. Smith v. New Jersey, 361 U.S. 861 (1959). Smith next sought habeas corpus in the court below. The writ was denied him. 201 F. Supp. 272 (1962).

The court below, Judge Lane, wrote an exhaustive opinion, dividing Smith's arguments into three main groups, "I. Issues Not Raised in the State Courts", "II. Issues

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[2] See the items constituting alleged newly discovered evidence as set out in the opinion of the Supreme Court of New Jersey in State v. Smith, 29 N.J. 561, 150 A.2d 769 (1959).

Raised in the State Courts", and "III. Issues Raised in Part in the State Courts". Judge Lane described Smith's contentions by setting out twelve categories, as follows: (1) an accumulation, combination and aggregation of errors in the State Court, allegedly constituting a denial of due process; (2) the assertion that the State should produce a tape recording of a "truth serum", a sodium amytal, test that had been administered to Smith; (3) a contention that Smith was unlawfully arrested; (4) that Smith was not given the opportunity to object to the trial court's charge before the jury retired; (5) that after the rape-murder theory of the case advanced by the State was declared by the trial judge to be insufficiently supported by the evidence, there was no adequate charge to remove this issue from consideration by the jury;[3] (6) that Smith's trial counsel was inadequate; (7) that a new trial was improperly denied; (8) that the charge of the trial court on the issue of the voluntary nature of Smith's admissions was fundamental error; (9) that the admissions of Smith, in substance constituting a confession were involuntary; (10) that the judge did not allow the jury to consider the alleged non-voluntary nature of Smith's statement after he had determined that they were voluntary; (11) that the trial court was in error in failing to charge properly and lawfully as to Smith's defenses, and (12) that the charge of the trial court was erroneous in that there was failure to charge as to all possible degrees of homicide, including manslaughter.

Judge Lane decided that the issues presented by the first eight categories had not been raised in the New Jersey State Courts and that therefore Smith had not exhausted his state remedies in respect to them as required by 28 U.S.C. Section 2254. As to the eleventh and twelfth categories, Judge Lane found that Smith failed to exhaust his

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[3] See p. 976a of Smith appendix on his appeal from the judgment of conviction to the Supreme Court of New Jersey at docket #2359. See State v. Smith, 43 N.J. 67, 202 A.2d 669 (1964).

state remedies on parts of those claims. As to the other parts, Judge Lane agreed with the holding of the New Jersey Supreme Court that no error had been committed by the trial court in charging the jury as to Smith's asserted defenses and in exploring the difference between first and second degree murder. Judge Lane devoted most of his opinion to categories nine and ten, respecting the voluntary or involuntary nature of the incriminating statement made by Smith, his admissions. He concluded that Smith's admissions contained in the statement were voluntary and were admissible. See Id., *supra,* at 276-282.

It would appear that Judge Lane, however, did not hold a plenary evidentiary hearing on the issue of the voluntariness of Smith's statement or confession. The majority opinion states that such a hearing was offered by Judge Lane to Smith but that his counsel rejected it, quoting the colloquy between Judge Lane and Smith's counsel. I am far from certain, however, that there was an offer of an evidentiary hearing or that Smith's counsel rejected it.[4] Judge Lane had oral argument and ordered produced and had before him (1) the transcript of Smith's trial, (2) the transcript of the hearing on the motion for a new trial, and (3) the briefs and appendix on the first appeal to the Supreme Court of New Jersey and on the second appeal to

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[4] The matter is far from clear. Judge Mendon Morrill had been conducting the habeas corpus proceeding. Upon his death the case was assigned to Judge Lane. Judge Lane permitted counsel to file a supplemental habeas corpus petition and an answer thereto. The colloquy between Judge Lane and counsel seems to me to be directed to the issue of whether or not the case would proceed upon the original petition for habeas corpus and answer, the supplemental petition for habeas corpus and answer, or on both sets of pleadings. See pp. 121a to 127a of the Appellant's Appendix. In any event Judge Lane could not have had the decision in Townsend v. Sain, 372 U.S. 293 (1963), before his eye because at the time of the hearing referred to the opinion of the Supreme Court had not yet been handed down.

that Court and also the petition for certiorari to the Supreme Court of the United States.

The denial of habeas corpus by Judge Lane was affirmed by this court on July 24, 1963, two judges, dissenting, one on denial of rehearing, 322 F.2d 810 (1963). This court held, inter alia, that Smith's statement was voluntary and that any issues presented by the failure of the State to produce a tape recording in relation to the use of a "truth serum", sodium amytal test, hereinafter referred to, were not properly before Judge Lane and therefore not adjudicable on appeal. This court also stated: "It is very plain that the trial judge, under the governing law of New Jersey at that time, held an adequate preliminary hearing as to the voluntariness of the statement. It is also very plain that his decision that the statement was in the nature of a confession and that it was voluntary, was fully supported by the evidence."[5] No express ruling was made in respect to the acknowledgment by Smith of the correctness of his incriminating statement to deLisle. Townsend v. Sain, 372 U.S. 293, had been decided on March 18, 1963. The Supreme Court denied certiorari, 376 U.S. 928 (1964), Mr. Justice Douglas dissenting. But see Sobell v. United States, 344 U.S. 889-90 (1952), opinion by Mr. Justice Frankfurter.

Later, in 1964, Smith brought a proceeding for post-conviction relief in the New Jersey Bergen County Court. R.R. 3:10-a-1 to 3. Relief was denied. He then appealed to the Supreme Court of New Jersey raising many issues, some of which had been previously raised in the habeas corpus proceeding before Judge Lane hereinbefore referred to and, as appears, were adjudicated by this court. Some of the issues raised in the Supreme Court of New Jersey were those which Judge Lane had found had not theretofore

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[5] See United States v. State of New Jersey, 322 F.2d 810, at p. 817 (1963), decided July 24, 1963, reh. denied September 9, 1963. Judge Lane had made a substantially similar ruling, 201 F.Supp. at 278-82.

been raised in the State Courts. The issues raised before the Supreme Court of New Jersey included (1) objections to the adequacy of the charge on several grounds; (2) the assertion that the issue of the voluntariness of Smith's confession was decided by the trial judge without the intervention of the jury; (3) the contention that the trial court erred in failing to charge on manslaughter; (4) the assertion that Smith was not bound in the post-conviction proceedings by the determination of issues by the denial of his motion for a new trial; (5) the argument that the State misused evidence relating to the so-called "truth-serum examination"; (6) the contention that certain physical property, such as articles of clothing, had been obtained by illegal search and seizure and were therefore not admissible in evidence; (7) the contention that the trial court failed to admit into evidence the fact that Smith had offered to submit to a lie detection test, and (8) the assertion that Smith's statement should have been excluded because he had no counsel when the incriminating statement was made or at the time when the State alleges that he admitted that the transcript of his incriminating statement was correct. The Bergen County Court, insofar as the record of the post-conviction proceedings before us shows, did not receive any evidence on the issue of whether Smith's incriminating admissions and his alleged affirmation of them were voluntary.

The Supreme Court of New Jersey ruled against Smith's contentions in respect to the inadequacy of the charge to the jury on the ground that his objections could not be urged by way of post-conviction relief. In respect to items "(2)", "(6)" and "(8)" the Court ruled that on the state of the law as it was at the time of Smith's trial, he had not been denied due process of law. As to item "(5)" the Court held that Smith's contention was invalid because he had failed to raise the issue at trial. Post-Conviction relief was denied, and Smith's stay of execution was vacated. State v. Smith, 43 N.J. 67, 84, 202 A.2d 669, 678 (1964). Certiorari was denied by the Supreme Court,

379 U.S. 1005, reh. denied, 380 U.S. 933 (1965). Subsequently, a petition for habeas corpus was denied by the Bergen County Court on March 29, 1965,[6] and leave to appeal was denied by the New Jersey Supreme Court on April 13, 1965. That Court also denied a petition for reconsideration on June 22, 1965.

On July 13, 1965, a second petition for habeas corpus was filed in the court below. This petition was enlarged by a supplement and eventually by an additional pleading designated as an "Application for Reconsideration". These are the pleadings presently before us. The bases for the relief sought were much enlarged by these pleadings. There was no plenary evidentiary hearing in the Court below, Judge Lane being apparently of the view that no substantial new constitutional issues were presented. The writ was denied and the appeal at bar followed. The allegations of the second petition for habeas and its supplements will be examined after discussion of the inquisition of the Bergen County Trial Court into the voluntariness of Smith's incriminating statement and his admission as to its accuracy.

Prior to any determination at Smith's trial as to whether Smith's admissions had been voluntarily obtained and prior to their admission into evidence, four witnesses testified in the presence of the jury that Smith's statement was given voluntarily. The reporter who took Smith's statement was the fifth witness to testify before the jury as to the voluntary nature of the statement and its contents. The prosecutor then offered the statement in evidence.

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[6] Efforts to procure complete records from the lower New Jersey State Courts of Smith's post-conviction applications for relief have proved unavailing. I am, therefore, forced to assume that no issues were decided by them except as indicated in this opinion. It is noted that in Townsend v. Sain, 372 U.S. 293, 319, it was held that in the absence of a state court record a Federal court may, and in some instances must hold an evidentiary hearing.

At this time Smith's counsel objected because he had not read the statement and doubted whether it met the legal requirements necessary to constitute a confession. Smith's counsel at that time also stated that he had no doubt that the confession was voluntary. Thereafter, having read the statement, Smith's counsel did object to the statement's admission into evidence but only on the ground that it did not constitute a confession under the law of New Jersey. At this point the jury was finally excused. There followed a colloquy between the prosecutor, Smith's counsel and the trial judge during which Smith's counsel made it clear that he did question the voluntariness of the statement.[7]

After the jury had withdrawn the trial court heard further evidence as to the voluntariness of Smith's statement. Smith himself testified, but he neither categorically admitted nor denied the voluntariness of his statement. He testified that his interrogation lasted for approximately ten and a half hours, that he was kept substantially without food and subjected to questioning by a battery of police officers. After the jury returned Smith again took the witness stand. He testified that he gave the statement because he was in fear of Hommell who he at least impliedly asserted was the actual killer, that he was questioned by a great many police officers, that the police pulled a sample of his hair from his head, that he had very little food, that he was without sleep for approximately thirty-one hours, and that his fiingernails were clipped. The trial court found

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[7] "Mr. Selser [Smith's counsel]: . . . I think too I should like to call Smith with regard to it [the statement] and have some testimony taken with regard to the circumstances preceding the taking, up to the time of the taking.

"The Court: As to the voluntariness?

"Mr. Selser: Yes, as to the voluntariness, as to his state of mind and the circumstances, all of which led up to the event, all of which would go into the voluntariness of the statement." Appendix to Appellant's brief in the Supreme Court of New Jersey, p. 537a.

Smith's incriminating statement to have been given voluntarily and that it constituted a confession under the law of New Jersey. The transcript of the statement was admitted into evidence when the jury returned. Later, Detective deLisle testified as to the alleged acknowledgment by Smith of the accuracy of the transcript, testimony the truth of which Smith denied. Smith's counsel made no objection to the admission of deLisle's testimony as to the alleged acknowledgment of its accuracy by Smith, without which the transcript would have been inadmissible.

In my view the incriminating admissions of Smith constituting the statement set out in the transcript, and Smith's acknowledgment of the accuracy of that transcript, may not be considered separately. They are logically inseparable and together present an issue of voluntariness under the Fourteenth Amendment. The Bergen County Court at Smith's trial did not consider these two elements in unity. No inquiry was made as to the voluntariness of Smith's acknowledgment of the accuracy of his statement to deLisle. Indeed, deLisle was not subjected to any meaningful cross-examination.[8] [9] The State's witnesses were scarcely cross-examined at all. All relevant facts were not presented at the State Court hearings. I emphasize again that Smith was not warned of his rights, and that this admitted fact was not brought upon the record except perhaps by implication. There was no other fact

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[8] Smith's trial counsel's cross-examination consisted of two questions: "Q. Who was his lawyer then? A. I think a Mr. Gaudielle. Q. I was not then his lawyer, was I? A. I don't think so." See 521a of Appendix filed in the Supreme Court of New Jersey at Docket No. 2359. See note 3, *supra*.

[9] We cannot deem the failure of Smith's counsel to object to be a waiver of a constitutional right by Smith. See the doctrine of fundamental error, McNello v. John B. Kelly, Inc., 283 F.2d 96, 101-103 (3 Cir. 1960). See also 28 U.S.C. Section 2106. Cf. Rule 51, Fed. R. Civ. Proc., 28 U.S.C.

inquiry. I cannot deem the examination of this issue to have been sufficient to meet constitutional requirements.[10]

But it is necessary to deal now with the issues presented by Smith's second petition for habeas corpus, its supplement and the application for reconsideration by the court below.[11] If these lengthy pleadings be examined and their allegations contrasted with the evidence given by the witnesses at the inquiry by the Bergen County Trial Court into the voluntariness of Smith's incriminating statement, it will be observed how comparatively little evidence that

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[10] The Supreme Court's decision in Johnson v. New Jersey, 384 U.S. 719 (1966), which held Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda v. Arizona, *Id.* at 436 (1964), to be nonretroactive, emphasizes the importance, one of long standing, of the protection to be accorded under Townsend v. Sain, *supra.* Mr. Chief Justice Warren stated, *Id.* at 730:

> "At the same time, our case law on coerced confessions is available for persons whose trials have already been completed, providing of course that the procedural prerequisites for direct or collateral attack are met. See *Fay* v. *Noia,* 372 U.S. 391 (1963). Prisoners may invoke a substantive test of voluntariness which, because of the persistence of abusive practices, has become increasingly meticulous through the years. See *Reck* v. *Pate,* 367 U.S. 433 (1961). That test now takes specific account of the failure to advise the accused of his privilege against self-incrimination or to allow him access to outside assistance. See *Haynes* v. *Washington,* 373 U.S. 503 (1963); *Spano* v. *New York,* 360 U.S. 315 (1959). Prisoners are also entitled to present evidence anew on this aspect of the voluntariness of their confessions if a full and fair hearing has not already been afforded them. See *Townsend* v. *Sain,* 372 U.S. 293 (1963). Thus while *Escobedo* and *Miranda* provide important new safeguards against the use of unreliable statements at trial, the nonretroactivity of these decisions will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim."

[11] For the sake of brevity we will refer to these conglomerate pleadings as the "second petition for habeas corpus".

Court had before it relating to the period between the time when Smith was first taken into custody by the police and the time when he gave his incriminating statement. But the period of time referred to is of vital significance in ascertaining the voluntariness of Smith's statement. The allegations of the petition are fairly set out in the relator's brief and are quoted verbatim in the footnote below.[12]

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[12] As follows: Smith's first contact with the police came when he was taken into custody at about 11:00 p.m. on March 5, 1957. He had just gotten into bed when the police arrived and told him they wanted him to go with them to the Mahwah Police Station. The police gave no specific reason for their request. Smith had been awake since 8:30 that morning, and when taken into custody by the police he had been without sleep for 14½ hours. In addition, he had been ill for several days and still was unable to eat solid foods. At Mahwah he was taken to a small office and interrogated by Prosecutor Calissi, Assistant Prosecutor Galda, Mahwah Police Chief Smith, Captain De Marco of the prosecutor's office and several other police officers. He was not advised of any rights he might have. During this time Prosecutor Calissi asked him if he would consent to a lie detector test, telling him it could not hurt him if the story were true and that in any event it could not be used in Court. Smith said he would prefer to see a lawyer before consenting. Captain De Marco said the county prosecutor should know better than any lawyer, but Smith continued to refuse the lie-detector test and the subject was dropped.

After this questioning, the next five hours were spent in three or four trips to various places, including two trips to the scene of the crime. Between these trips, Smith either was interrogated or required to sit in the Municipal Courtroom. The respites from interrogation did not total more than one half hour, and during this period he could not smoke nor speak except in response to questions. He was always guarded by one of the detectives. Detective Sinatra was at his side all night long, including in the men's room. During the night he asked Captain De Marco if he could phone his wife because she might be waiting up for him. He was told by the Captain that he did not have authority to permit that.

During the trips he was asked continually to tell his story, to "tell it again". Sinatra sat in the back seat of the car with him on every trip and Sinatra constantly repeated that he would hate to be asked the same questions over and over and that if he (Sina-

Some of the facts referred to were testified to at the Bergen County trial, but very many were not. One of the apparent issues left uninvestigated is the asserted administration of

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tra) had something to say he would want to say it and would then feel better. It seemed to Smith that Sinatra would ask him every few minutes how Smith thought the guy who "did this" must feel "right now." Sinatra would answer his own question by saying "the guy is probably wishing he could talk to someone and get it off his chest."

At about 5:00 a.m., Smith was taken by Captain De Marco and Detective Sinatra to De Marco's home where the Captain left them and told Sinatra to take Smith to a diner for breakfast. At the diner Smith ordered eggs, toast and coffee but his stomach was still upset and he could not eat the eggs. The cup of coffee was his second since being taken into custody; he finally was permitted to smoke. He asked again if he could stop and see his wife since the diner was only a couple of blocks from his mother-in-law's home, but Sinatra would not permit that and would not permit Smith to phone her.

From the diner Sinatra picked DeMarco up at his home and drove Smith to the Hackensack office of the County Medical Examiner, Dr. Gilady. The doctor stripped Smith naked and examined him. Smith was not told that he was going to be examined nor was he told the purpose of the examination. He was not told of any right to refuse the examination. He was examined by the doctor in the presence of several police officers. Thereafter, he was taken to the prosecutor's office in the County Court House, at about 8:30 a.m. By that time he had been in custody 9½ hours and without sleep for 24 hours.

In a small side office at the prosecutor's office, a photographer arrived and photographed Smith's knees. Shortly after the photographs were taken and after repeated requests, Smith was permitted to phone his wife. Prior to requesting this permission to telephone his wife, he had requested and been denied permission to call an attorney. He asked and was also denied permission to call a Judge Dwyer, a former county judge and the father of a personal friend. He was told by a detective that there was no need for him to call an attorney because the prosecutor was a "good guy" who only "hated bookies" and that he would see to it that Smith got a "fair shake." The dectective told Smith of another defendant, a "poor guy" who could not afford a lawyer but who would get a good break from the prosecutor because he

sodium amytal in the so-called "truth-serum" test to Smith, even though this was done at the request of Smith's own counsel. Smith asserts the information elicited from him

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"cooperated." He told Smith also that the prosecutor was a member of the Knights of Columbus and a good Catholic who would treat him right. Smith again asked to be allowed to call an attorney and was told that he could call only his wife and to stop being "smart." At this time Smith had been awake more than 24 hours and did not feel like arguing.

A detective asked Smith his wife's telephone number, the number was checked in the telephone book and the call was put through by a detective. He was advised not to worry his wife because he would not need a lawyer. He was allowed to speak to his wife for a few minutes and during this period asked her to contact Judge Dwyer, who is his friend and ask him to seek his release from custody. He was then told that was all he could say and to hang up. After he hung up a dectective asked him if he knew the Judge and said he should not have bothered him because he did not need an attorney.

Shortly after the telephone call to his wife, he saw her standing in a corridor outside the office in which he was being questioned. He was told that she also was being questioned. Several times throughout the rest of the day he requested permission to see his wife, and was denied such permission. He was told he could see her and she could go home when Smith started "giving a few answers."

Smith later learned that his wife had been picked up by a county police radio car immediately after his phone call, that she was denied permission to speak with him, that she was told she could not call a lawyer because Smith did not need a lawyer, and that she was not permitted to call anyone until later in the day when his confession had been secured.

Following the telephone call to his wife, detective Spahr made Smith strip naked again and removed his clothing from the room. Before he left he told Smith to remain standing but after he left de Lisle told Smith he could sit. Spahr returned in a few minutes and shouted to Smith, "Who the hell told you to sit?" De Lisle said he had allowed Smith to sit whereupon Spahr pushed him back into the chair. This routine was performed three or four times. At one point Smith was pushed over the chair and onto the floor. After this incident de Lisle talked with Smith for a period of time and told him the questioning would go on until he

on the occasion of the administration of the drug was employed by the State of New Jersey unfairly and unlawfully and that his trial was prejudiced thereby. Another issue

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told the truth, that it would be better to clear things up, that his wife whom Smith had seen standing in the corridor was worrying and waiting to see him. Spahr then returned and told Smith that a priest from Don Bosco High School was waiting to see him and Smith was given a gray coverall to wear, which he later learned was a county jail work uniform. Up to this point Smith had been naked.

With regard to the priest, Smith alleges that he had never seen the priest before in his life, that he did not know his name, that he denied the crime when the priest asked him if he had done it, that he asked the priest to see his wife and find out if she had obtained a lawyer but the priest's response was that he could not help his wife because she was not a Catholic.

By noon on March 6, 1957, after continued questioning, after being refused all requests to see his wife, after being denied requests to call his lawyer, after being told that his trousers had been identified by his wife, that she was being questioned and had signed a statement, after being told that laboratory tests of his clothing had proved that he had been with the victim, that his wife was crying and he could see her as soon as he made a statement and that his wife would be taken home after he had "talked", he agreed to make the statement. Captain De Marco had told him how he thought the crime had been committed. It was Smith's hope to make a brief statement, without admitting guilt, which he could repudiate after seeing his attorney. He was tired, having been awake for 27½ hours, and was ready to do and say anything he was told.

After the statement had started but before Smith was taken outside, the prosecutor told him to wash and shave because photographers were outside and he looked terrible. He had been wearing the coveralls, and his colthing was returned to him.

Certain of the allegations made by Smith are supported by his mother. His mother's affidavit, concerning many facts which were told to her by Smith's then wife who was 19 years old, are supported to some degree by a statement taken of Smith's former wife by present counsel on August 5, 1965 in the presence of the former's wife's new husband and her attorney. The gist of this affidavit is that almost immediately after Smith had called his wife and asked to call Judge Dwyer, she had been picked up by

left undecided is that the Bergen County trial court did not charge the jury that if Smith was guilty of first-degree murder without recommendation of life imprisonment the imposition of the death penalty was mandatory. The facts relating to these allegations should be explored and found by the trial court.

Whatever may be the status of our former decision in United States v. State of New Jersey, *supra,* filed July 24, 1963, Smith's constitutional rights should now be reconsidered in the light of Townsend v. Sain for the principles of that decision are applicable retroactively and the doctrine of res judicata is not available in the habeas corpus proceeding presently before us. See Kimbro v. Heer, Warden, 386 U.S. 128 (1967), in which the Supreme Court vacated *Per Curiam;* a judgment of the Court of Appeals for the Sixth Circuit handed down in Kimbro v. Heer, Warden, 364 F.2d 116 (1966), and remanded the case to the District Court, citing Townsend v. Sain. Similar action was taken by the Supreme Court in Green v. Bomar, 379 U.S. 358 (1964).

In view of the foregoing, I would vacate the judgment of the court below and would remand the case for a plenary evidentiary hearing on the issues indicated in this opinion

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detectives from the prosecutor's office, and between the time of his call to her and the time she was picked up by police she had not had a chance to call either Smith's mother or Judge Dwyer. She was taken to the prosecutor's office and questioned by detectives and asked to identify Smith's pants. She asked many times for permission to see Smith but this was denied. She was told that Smith was there only for routine questioning, that they were questioning other people and that he did not need a lawyer. She was not returned to her mother's home until about 4:10 p.m., after Smith had given his statement. It is apparent from the affidavit of Smith's mother, taken together with Smith's allegations that he had called his wife and shortly thereafter caught a glimpse of her in the corridor while he was being held in a room, that the prosecutor had seen to it that Smith's wife was picked up prior to her being able to obtain a lawyer for her husband.

and any others which the court below might deem relevant. If the court below found facts and conclusions of law in favor of the State of New Jersey, some of the issues discussed herein would be adjudicated. If those issues were decided in Smith's favor, habeas corpus should then be granted by the court below and a new trial required. In either event issues involving the application of principles enunciated in Escobedo v. State of Illinois, 378 U.S. 486 (1964), Miranda v. State of Arizona, 384 U.S. 436 (1966), Jackson v. Denno, 384 U.S. 719 (1966), Massiah v. United States, 377 U.S. 201 (1964), and in associated decisions, may require determination.[13] If the second contingency comes to pass it would be presumptuous to suggest herein now how the principles of the decisions referred to should be applied by the New Jersey State Tribunals. If the first contingency eventuates, the court below should apply the principles of the decisions referred to insofar as they are pertinent. To state views now in the absence of findings of fact and conclusions of law by the court below, respecting the application of those principles would be futile. Moreover, the Supreme Court has made it clear that constitutional issues should not be decided except upon a full record. Honeyman v. Hanan, 300 U.S. 14, 25-26 (1937); Villa v. Van Schaick, 299 U.S. 152, 155-56 (1936).

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[13] I point out that though issues have been raised by the relator-appellant respecting the possible application of the principles enunciated in these cited cases the majority opinion in no wise directs itself to the problems presented.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16128

UNITED STATES OF AMERICA EX REL.
EDGAR H. SMITH, *Appellant*,

v.

HOWARD YEAGER, Warden, New Jersey State Prison
at Trenton

ON PETITION FOR REHEARING

Present: HASTIE, *Chief Judge*, MCLAUGHLIN, KALODNER, STALEY, FREEDMAN, SEITZ and VAN DUSEN, *Circuit Judges*.

Opinion of the Court

(Filed March 15, 1968)

PER CURIAM.

The petition for rehearing in this case has been considered and presents no new argument. A majority of the circuit judges in regular active service not having voted for rehearing en banc, the petition for rehearing will be denied.

FREEDMAN, *Circuit Judge*, dissenting.

Judge Biggs' dissent from the majority opinion of the panel raises for me sufficiently grave questions to require rehearing before the court en banc.

The majority opinion of the panel declares that "all the points now raised by appellant" were "fully considered

. . . on the occasion of his first appeal to this court" in *United States ex rel. Smith* v. *New Jersey,* 322 F.2d 810 (3 Cir. 1963) cert. denied, 376 U.S. 328 (1964). The panel majority therefore "consider that opinion dispositive" of this second appeal. It seems to me, however, that three claims in this second petition for habeas corpus were not adjudicated in our prior decision.

(1) Appellant claims that his confirmation of his confession, given after his indictment, was unconstitutionally obtained because it was taken outside the presence of his counsel, contrary to the subsequent rule of *Massiah* v. *United States,* 377 U.S. 201 (1964), which he contends is retroactively applicable to his case. While the facts on which this claim is made were in the first petition for federal habeas corpus this contention obviously could not have been advanced in the first case either in the district court or on appeal to us, for *Massiah* was handed down after we decided the first appeal.

(2) Appellant claims that evidence against him was obtained as a result of information involuntarily extracted from him by the use of a truth serum. This claim substantially was presented in appellant's first petition for federal habeas corpus, but it was not considered either in the district court or by us on appeal because of failure to exhaust available state court remedies.

(3) Appellant claims that he was deprived of due process because the jury was permitted to render a verdict of guilty of first degree murder which automatically required the imposition of the death penalty without being informed that this consequence would follow unless they made a recommendation of mercy. This claim was not raised in the first petition for federal habeas corpus and was not involved in the first appeal.

I say nothing of the merits of these contentions. It is enough for me that they were not previously adjudicated

and are now lost in the majority's conclusion that the first appeal is dispositive of the present one.

Appellant also claims that he is entitled to a federal court hearing on the voluntariness of his confession because the state court record is inadequate under the expanded right to a hearing recognized in *Townsend* v. *Sain*, 372 U.S. 293 (1963).[1] This claim was rejected by the district court on the ground that it was adjudicated by our decision on the first appeal. The panel majority now affirms this and adds that although the first appeal was argued before *Townsend* v. *Sain* was handed down, its application to appellant's first appeal was considered by the first panel in rendering its decision and by the court en banc in refusing a petition for rehearing in which *Townsend* was expressly relied on.

I find this answer to appellant's claim unpersuasive because appellant makes substantial allegations in the present proceeding which do not appear in the prior federal habeas corpus proceeding or in the state court record and which go to the question of the voluntariness of his confession and therefore affect the adequacy of the state court record.

For example, appellant now alleges for the first time that during his interrogation before making his confession he was forced to strip naked and was left in a room with two detectives who taunted him, pushed him, and knocked him down. He alleges that during this episode the detectives told him that they would question him until he told them the truth and that his wife whom he had seen in the corridor was worried and was waiting for him. He also adds now, among other new allegations, that his statement was made after the police told him that his wife, who was being held by them, would be released when he "talked".

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[1] See also the new habeas corpus act, 28 U.S.C. § 2254(d).

The fact that appellant did not present such facts in his first petition for federal habeas corpus should not preclude our consideration of them now. That proceeding occurred prior to *Townsend* v. *Sain*, when a federal plenary hearing was considered primarily a matter of grace rather than of right (*Brown* v. *Allen*, 344 U.S. 443 (1953)) and when counsel could readily have believed that allegations such as these would be unavailing.

I also do not believe appellant's claim that he is entitled to a federal habeas corpus hearing may be rejected summarily on the ground of waiver, even if the language of his then counsel, quoted in the majority opinion of the panel, is construed as an expression of belief that the state court record was adequate and that a federal hearing therefore was unnecessary. It is clear that counsel will not be deemed to have waived a right which did not exist at the time. To me it is equally incredible that counsel should be said to have waived in its entirety a right which existed only partially at the time.

Even if it could be said that counsel had waived expressly and completely all right to a federal hearing, I have serious doubt that such a waiver should be held binding on a defendant in a capital case. We should be on guard against applying to a defendant in such a case a doctrine which would estop him from the assertion of rights which might save his life because of an erroneous judgment of his lawyer which does not deal with the merits of his claim.

I therefore believe the case should be reheard before the court en banc and dissent from the denial of the petition for rehearing.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,128

THE UNITED STATES OF AMERICA, EX REL.
EDGAR H. SMITH, *Appellant,*

v.

HOWARD YEAGER, Warden, New Jersey State Prison
at Trenton

(D. C Civil Action No. 766-65)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: HASTIE, *Chief Judge,* and BIGGS and STALEY, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed June 23, 1966, be, and the same is hereby affirmed, with costs.

ATTEST:
M. ELIZABETH FERGUSON
M. Elizabeth Ferguson,
Chief Deputy Clerk

January 2, 1968

Order

(Received March 14, 1968)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,128

UNITED STATES OF AMERICA EX REL.
EDGAR H. SMITH, *Appellant*,

v.

HOWARD YEAGER, Warden, New Jersey State Prison
at Trenton

SUR PETITION FOR REHEARING

Present: HASTIE, *Chief Judge*, MCLAUGHLIN, KALODNER, STALEY, SMITH, FREEDMAN, SEITZ and VAN DUSEN, *Circuit Judges*.

The Petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court
(Sgd.) STALEY
Judge

Dated: March 15, 1968

Article

(ESQUIRE MAGAZINE, November 1965)

THE APPROACHING END OF EDGAR H. SMITH, JR.

by WILLIAM F. BUCKLEY, JR.

It is very difficult, in New Jersey, to arrange to see a prisoner in the Death House. The visiting regulations were clearly designed in an age when neither legal hanky-panky, nor a deep social ambivalence concerning capital punishment, nor a Supreme Court that sometimes seems more tortured by punishment than by crime, could separately or in combination work to keep a man in the Death House almost endlessly. A few months used to be routine; and then the prisoner was executed, or, under special circumstances, the Governor would reprieve the sentence. Meanwhile, there were to be very few amenities, and practically none at all of a social character. One member of your immediate family may visit you once a month, and you can write home fives times every month. The correspondence, in and out, is checked by prison monitors, who are supposed to look out for any signs that you are preparing a jailbreak, but who, inevitably, by their faceless presence on every page, inhibit a prisoner, as also a naturally reserved correspondent. The monitor, whose stool is set up alongside your own, is also there to listen to every word spoken to or by the prisoner.

Several years ago I wrote to a prisoner at the Death House, having seen a newspaper clipping which described, among other things, his reading habits, to ask if he would care to receive *National Review*, a journal I edit. The clipping from a New Jersey newspaper reported on a day in the life of Edgar Smith, #34837 D.H., as he is officially designated, then twenty-seven years old. The article mentioned that he used to read *National Review* but no longer

saw it because the chaplain whose copy he used to borrow had been transferred. My letter was returned by the prison authorities, with a form note to the effect that I was not an authorized correspondent of the prisoner. One needs, then, to dig around a bit. I did so, and in due course the prisoner and I exchanged, under a temporary dispensation, one or two letters. *"I hope all these problems,"* he wrote me, *"will soon be solved and that the temporary difficulties will not reduce your interest in my case."* The temporary difficulties had to do with an attempt by a colleague, Donald Coxe, to visit Smith—we had decided to prepare an article on his extraordinary case. But the application to visit the prisoner was ruled out of the question even for Coxe, who is a lawyer. Judge Arthur O'Dea of Bergen County—who presided at the trial and sentenced Smith to death (he had no alternative: the jury did not recommend mercy), appears to have done his duty vigorously during the subsequent eight years in galloping off to every corner of the legal battleground just in time to shoot down Edgar Smith's latest, most unexpected, most ingenious legal flyer—said No: in unambiguous terms. He will not permit, he was quoted as saying, the Edgar Smith case to become another Caryl Chessman case. Besides—the judge didn't say this, but I infer from his behavior that he profoundly believes it—Edgar Smith is, as the jury found, guilty as sin, and the time has come to stop humoring him in the courts of law, and get on with the sentence demanded by law.

But after two and one-half years, Judge O'Dea relented. He is, one judges, a very good lawyer (and, undoubtedly, a very good man); and he felt he had to authorize one (1) visit when, a few months ago, I undertook to think through the problem of financing Smith's final fight to save his life. It was Smith, not I, who detected, in this new role of mine, safe passage around the dragon's lair. In February of this year he wrote to tell me that the United States Supreme Court had denied his most recent petition for a retrial.

And then, as is characteristic when he has bad news to report—which has been exactly as often as any court of law has ruled on one of his myriad appeals (a total of seven times in the period I have been in touch with him)—he follows up the gloomy news with a dash of optimism or, less frequently, of good news. "Well, I'm not a total failure. Judge O'Dea has granted the request for the Court order allowing visitation. The dungeons have been thrown open for your inspection."

I drove around the squat red-stone prison, which casts its gloom over the entire center of Trenton, looking for the tiny doorway through which visitors are unwelcome, and thought about the problem of the immediately preceding few days. Smith, for the first time in my experience, was furious. Judge O'Dea's permission to visit Smith had been actively opposed by the prison's warden and, one gathers, by a New Jersey newspaperman resentful that another journalist was being permitted, though to be sure not in his professional capacity, into the forbidden area. Two days earlier, Smith had written me that the anti-Visit forces had made their move. *"You won't have any trouble getting in to see me—the Order assures that, but the visit would probably be a waste of your time. Rather than follow the accepted procedure of appealing the Order, someone came up with the bureaucrat's typical back-door approach; they obtained a letter-opinion from a Deputy Attorney General, giving the Order an interpretation which virtually nullifies its effect. This interpretation is that the Order bans any discussion of my case—past, present, and future."* In other words, although I was to be permitted to see him, I was not to be permitted to discuss any of the reasons why I was visiting him at a penitentiary, instead of at the home where his mother brought him up, in Ramsey New Jersey, or at the trailer camp where he lived with his wife and baby in next-door Mahwah at the time the murder was committed. *"Bill, I'll tell you right now that Smith has just about had it."* I was

truly alarmed, after long experience with his preternatural serenity. *"I don't think we should give in and allow the Order to be circumvented. You can come down next Friday if you wish, but my opinion is that we should go back to Court. This Deputy Attorney General doesn't have a leg to stand on; I think his interpretation should be appealed. Please, let me know what you think, I'm too burned up right now to write any more."* I wired him that I would arrive as scheduled.

I was taken in to see Mr. Edmonds, the assistant to Warden Yeager, who was in conference. Mr. Edmonds asked me whether I knew of the restrictions the Attorney General had imposed on my visit, and I said I did. Would I wait just a few moments, to meet Warden Yeager, before going in to see Smith? I would, with pleasure; and attempted to make some appropriate conversation. When was the last execution? A long time ago in January, 1963. When was the first? At the turn of the century. How many men had died on that chair. One hundred sixty. How many men were presently in the Death House? Fourteen. Capacity? Eighteen. Where had Bruno Hauptmann, the killer of Lindbergh's baby, stayed? In the cell directly above Smith's.

Warden Yeager was ready, and I met him and his staff, and we exchanged pleasantries. A big man, tough, duty-minded, but nonetheless friendly. It remained for me to be frisked, and an official took me to a private room and asked me to empty my pockets of anything with metal in it. I did so perfunctorily and he began to move a metal-detecting type instrument down from my head. It reached my chest and let out an angry and sustained beep. He shut it off and asked me to examine my breast pocket. Out came a Scripto pencil, with the little offending aluminum catch. The search went on. Twice more the Frisker (pat. pend., I noticed) caught me in flagrante, but finally it reached my shoes, and finding there not a file nor even

a razor, I was moved on and introduced to Captain Malkin, who was to be my companion. We moved to a great partition, and a turnkey opened a door. We stepped into a circular, silo-like structure, from which two corridors went out, where the regular prisoners were quartered. It is completely enclosed, and high above it, surrounded by bulletproof glass, is the central communications center of the prison. From there an official will confirm, or deny, an escort's instructions to the turnkeys, who communicate with the center by walkie-talkie. The central command had to be consulted before we were let out of the silo, at the opposite end from which we had entered it, out onto the open compound, to walk a hundred fifty yards to the small, isolated, windowless fort-within-a-fort, where the condemned go before stepping conveniently into the far end of the same building, to sit down in the electric chair.

Again, radio control confirmed Captain Malkin's instructions to open the door, and it creaked open, admitting a ray of daylight for the briefest moment, visible to the first three or four of the double-decker cells. Naked light bulbs hung overhead, and three television sets were blaring in the corridor, one for three prisoners, programs by majority vote, stations tuned in by the guards. I was led to the very end of the corridor, to within a few feet of the electric chair, from which I was separated by a metal door. On my right was Edgar H. Smith, Jr., who long since has broken the New Jersey record for the longest stay in the death cell—it is over eight years since he has seen daylight. I couldn't see him well, because in addition to the steel bars, they roll a steel screen that fits snugly over the entire front of the cell. I found myself wondering why it was necessary to exercise the Frisker on me. It was all I could do to see Smith. I could not have passed him a needle, even assuming Captain Malkin had nodded. I could, however, see clearly the dimensions of his cell, eight feet long, eight feet wide, nine feet high. Every Friday he steps out into the corridor, and takes a

shower under a naked spigot; once a month, he steps out into the corridor for a haircut. I commiserated with him once. *"I appreciate your thoughts about my lack of exercise. It isn't all that bad. I walk a lot, like the pussycats in the zoo."*

He spoke for an hour—careful, though not overly so, not to touch on "the case," which it was Captain Malkin's duty to see that we didn't. We spoke about future appeals. He explained to me in some detail what his present legal situation was and how he hoped, ultimately, to force the courts to grant him a retrial. I found myself, for the hundreth time, marveling at the discipline of his thought. His voice betrayed a background of football lockers and poolrooms and beer taverns, faintly coarse, utterly inconsistent with his writing style, which is Victorian to the point of prudery. (*"Damn!"* he wrote on hearing my wife had broken her leg a few weeks earlier. *"What bad luck!"*) He had never finished high school, going instead into the Marines, where he served as a paratrooper and was discharged before his tour of duty was over because of a slight deafness in one ear. He was eleven when his mother and father were divorced, and was brought up by his devoted mother and his stepfather. At fourteen, he had got into trouble. A ten-year-old girl complained that he had fooled with her. He denied having done so, and the girl apparently had a querulous record. The judge, generally unconvinced, put young Edgar on probation for three years, and never received any further complaint against him. His mother sent him, as a day student, to a Catholic boarding school nearby, which Smith left after two years because the school committed the unpardonable sin of abolishing football, to which, above all other things, Smith was committed. He went to a public school, but left before his senior year, to join the Marines.

On getting out of the service he drifted from job to job, a leading member of the fresh set, taking and leaving

jobs every few weeks or months. When he married, he bought a trailer. And when he ran out of money, he sold the trailer's wheels—even though they, as part of the trailer, were derivatively mortgaged. Mr. A. D. Nicol, a private investigator from Hackensack who was retained by Smith's mother until her savings were exhausted (he worked thereafter, and continues to work today, eight years later, free of charge: tirelessly running down leads), could only come up with three people, of the hundreds he interviewed, who thought that Smith, notwithstanding his diffuse impulsiveness, could be capable of an act of violence. Two of the three—a taxi driver, and a station attendant—didn't know him well. The third, Don Hommell, was the man Smith swears he left the girl with on the evening of March 4, 1957, a few minutes before nine at night, twelve hours before she was discovered, sixty feet away, just beyond the profile of the sandpit, her brains splattered about by a fourteen-pound boulder.

—I was listening to an almost forbiddingly technical analysis of his legal situation, and it was a full half hour before I got the gist of it. Smith has become if not a finished lawyer—that takes experience—an extraordinarily resourceful and ingenious one, whose most recent appeal was described by Judge O'Dea as having been drafted with the "consummate skill of a seasoned practitioner." For eighteen months Smith had been conducting his own legal defense, filing briefs forty and fifty pages long, which had been typed by a fellow prisoner, and submitted to the Courts in *forma pauperis*. He had exhausted the philanthropic reserves of a lawyer who had taken his case, unsuccessfully, to the Supreme Court, and for a while had submitted to a lawyer designated by the Court. After a few months with him, Smith, dissatisfied, fired him—only to have him refuse to withdraw, leaving Smith in a most unusual state of virtual speechlessness. [The lawyer] *"has flatly refused to retire from my case. He said he would go ahead and argue the appeal on May 18.*

I will press him to withdraw and make certain he does. Can you imagine a lawyer saying he would not be dismissed? .It all adds up to the aroma I detected when he was appointed."

My monitor was getting restless, and I got up to go. We said good-bye and I started down the corridor; when suddenly my escort drew aside to talk to a guard, leaving me directly opposite the elderly prisoner whose cell is adjacent to Smith's. "Hello, Mr. Buckley," he said (the prisoners know the names of other prisoners' visitors). "Hello," I said, not quite knowing how to take the conversation from there. "Whom did *you* kill?" seemed inappropriate. But so was any talk about the weather, the weather being as far removed from the notice of men living in solitary confinement, without windows, as the fluctuations of the stock market. We smiled nervously at each other; Captain Malkin rejoined me. I bade goodbye to Smith's neighbor, and walked out. As we went back across the compound toward the fortified silo, Captain Malkin explained that most of the prisoners in the death cell are quickly abandoned even by their own families. "Edgar's wife used to come regularly for a couple of years. Then she went off, married someone else. She doesn't even write him any more. But his mother never misses." I said good-bye to the Warden. "Smith seems quite confident he'll leave here one of these days," I observed chattily. "Well, that's a safe prediction," he chuckled. "He'll leave here one way or another."

"I do wish," Smith wrote, *"our visit could have been longer, and free of restrictions. Perhaps someday we will be able to sit down and have a long talk, without worrying about any regulations. How about adopting me? You could then be on my regular family visiting list!* That *would go over big with Judge O'Dea!"*

In his opening remarks to the jury on May 15, 1957, Guy Calissi, the skilled chief prosecutor of Bergen County, out-

lined what the State intended to prove Edgar Smith had done. The State's theory of the case was that Smith had picked up Victoria Zielinski, driven to the sandpit with her, tried to make love to her; that she had become frightened and run away; that he grabbed a baseball bat, chased after her down the sandpit and onto Fardale Avenue, hit her with the bat, thrown it away, brought her (why?) back to the sandpit, carried her up a mound, and there killed her with a heavy boulder.

It took the Prosecutor five days to introduce the evidence to back up the theory. On the afternoon of March 4, 1957, Smith went bowling with two friends, Charles Rockefeller and Joe Gilroy. While bowling, Smith injured his ankle, an injury that was to prove relevant. After the game, Smith asked Gilroy if he could borrow his car to fetch some kerosene for the stove in his trailer home. After lighting the stove, he promised he would rejoin Gilroy and together they would have a few beers.

At eighty-twenty, Smith arrived at Secors gas station to buy the kerosene. He filled a five-gallon can, talked to a man whose car was having ignition trouble, and left.

Two witnesses testified that the time was about eight-thirty.

One hour before Smith left the gas station, the flirtatious Vickie Zielinski had gone out the door of her unsavory (to judge from subsequent divorce testimony) home. She had a test coming up the next morning at Ramsey High School and wanted to prepare for it with her friend Barbara Nixon. Vickie was afraid to walk alone at night, so her younger sister Myrna went with her halfway. (Strange. The younger sister then had to retread, alone, the same path her older sister had feared to take alone.) One hour later, at eight-thirty, Vickie said good night to Barbara and started walking home. As agreed, Myrna again left her house, at eight-forty, to meet her sister halfway and escort her home.

The State introduced at trial the statement Smith had given fourteen hours after being picked up.

He was on his way home with the kerosene—Smith said—when Vickie hailed him. He knew her only casually, but stopped to pick her up. The time was eight-thirty-seven or eight-forty.

When she got into the car, he said, she asked him not to drive her home by the direct route, because her sister was walking to meet her, and must not be allowed to see her in a car alone with a boy. At her suggestion, Smith said, he drove into a sandpit, a local lovers' lane, about two miles away, toward the ends of a loop that reached to within a half mile of Smith's own trailer. He parked the car. Vickie was talking to him about school. He lit a cigarette and let her drone on. Suddenly—and, Smith said to the police, without provocation—Vickie announced she was going to walk home by herself, and jeered at him, "I'm going to tell my father you're just like the other boys." (There are obvious implausibilities in this story, which become apparent in connection with the contradictory account Smith gave at the trial.)

Smith feared disagreeable consequences, he said, and tried to keep her from getting out of the car. She struggled. He hit her "a good one" with his hand. His memory of ensuing events, he then told the police, failed; but he vaguely remembered running somewhere. Eventually, he climbed back into his car and drove home. He remembered stopping, a hundred yards or so from the sandpit, on the road home to his trailer, alongside a Christmas tree he had planted some months before; but he wasn't sure why he stopped there, or what he did there. (The police searched the area and found Vickie's schoolbooks and wallet.) His right foot felt cold, and he noticed that he had lost his shoe (which had not been laced up, because of the ankle injury).

He reached home. Before entering the trailer, he had removed his pants because he saw that they were blood-stained. He told his wife he had got sick over them and discarded them. He filled the kerosene tank outside the trailer and then attempted, and failed, to light the stove. The night being especially cold (22°), he and his wife decided they would spend the night with her mother in Ridgewood.

He went outdoors to a pay telephone and called Gilroy. (The time of his call was nine-ten, Gilroy testified.) Smith told him he had been sick and didn't want to drink beer after all, that he hadn't been able to light the stove, and would therefore take the family to sleep elsewhere. Would Gilroy drive them to Ridgewood? He agreed.

Smith set out alone to pick up Gilroy, having informed his wife they'd be back shortly to drive together to Ridgewood. He went directly to the nearby sandpit to retrieve the lost shoe. He must have left the sandpit by nine-thirty at the latest to have arrived at Gilroy's at nine-forty. On the way he dumped his bloodied pants—just where, he told the police, he didn't remember. They drove together back to the trailer, picked up his wife and child, and arrived at Ridgewood at ten-fifteen.

Meanwhile, Myrna had walked all the way to the Nixon home, only to learn that Vickie had left on schedule. She and her mother waited up until midnight, then woke Mr. Zielinski. He and a third daughter drove around for two hours looking for Vickie. The next morning they renewed the search. Driving along Fardale Avenue they saw Vickie's scarf and shoe. Mrs. Zielinski went into the adjacent house to telephone the police. Zielinski walked a hundred yards down Fardale Avenue, where the road petered out into the sandpit. He saw there, at the crest of the gravel road close to the spot where Smith's car had been parked, his daughter's bloodstained gloves, lying on the road; but ignored them because, he said, he did not

recognize them as belonging to Vickie. He turned and walked back to where the scarf and shoe had been found, by which time the police arrived. He and a policeman walked back to the sandpit. The policeman noticed the gloves, and they continued the search. They discovered the brains sixty feet away, whereupon Zielinski spotted the corpse. He called out to his wife that he had found her.

Vickie, the coroner reported, had been wearing boys' blue jeans. The fly was secure; she was wearing "immaculate" white panties; and was *virgo intacta*. Her sweater had been pulled up and her bra yanked down. Small bruises were found on her which the coroner said were tooth marks. Cause of death, which was declared to have been instantaneous, was the total crushing of the skull. The coroner, at the trial, fixed the time at midnight March 4, "give or take an hour."

That afternoon Gilroy ran into Donald Hommell, a friend of Vickie and also of Smith, at their favorite hangout, Tony's Amoco Station. Gilroy told him he was on his way to pick up Smith at his mother-in-law's. Hommell suggested they drive over in his car, rather than Gilroy's. When they arrived, Smith came out with wife and baggage and asked whether "the murdered girl" was Vickie—he said he had heard radio broadcasts reporting the murder (details unspecified) of "Victoria" Zielinski. Hommell said, "Yeah," and, with a wink at Gilroy—"the cops know from the tire tracks the make of the killer's car and are checking all the Mercurys in Bergen County."

Smith, according to Gilroy, paled visibly.

Recalling the incident, Smith subsequently told the police, "That's when it hit me really hard I must have been the one who really did it." He meant by that, he said at the trial, that the initial blow he had given Vickie, he thought, might have caused her, unattended, to bleed to death.

Driving along in Hommell's car, someone (just who is disputed) found a lipstick and passed it to Hommell—who

had often dated Vickie—saying, "Maybe this is Vickie's?" Hommell said "No," and tossed it out the window.

Later that afternoon, Gilroy discovered two stains in his car—one on the left front seat, which was later identified as type "O" blood (Smith's blood is A, Vickie's was O)—and one on the right side of the transmission hump, which turned out to be kerosene. He recalled that Smith had told him about throwing away his pants because he got sick over them. Recalling that he had paled when Hommell mentioned the tire tracks, Gilroy went to the police.

The police picked Smith up for questioning at eleven-thirty that same night, shortly after he had gone to sleep. Under prolonged questioning he finally broke down. It was shortly after noon the next day that he gave the police the statement described above. He led the police to a garbage can where he had thrown away his shoes (which were stained with type O blood). He was not at any point during the prolonged questioning advised that he was entitled to the advice of counsel.

His pants were found by the police, though not at the spot he said he had left them, with his socks rolled up. They were found later near his mother's home, the pants spread out conspicuously, the socks stuffed in the pants' pockets. They were stained in the lower leg area with type O blood. Two months later, the baseball bat was found—in the woods, a hundred sixty feet from where the scarf and shoe, and hank of Vickie's hair—had been found.

The State depended heavily on Smith's statement—notwithstanding his denial that he had ever bashed a rock against Vickie's head. How could Smith explain it away?

To begin with, he gave it under extreme pressure. One of three judges in the U.S. Court of Appeals voted to give Smith a retrial in 1963, after reflecting on the circumstances.

The stark facts (said the judge) are that from 8:00 a.m. on the morning of March 5, 1957, until 3:45 p.m. on March

6, 1957—almost thirty-two hours—the appellant had no sleep with the exception of a couple of hours before he was taken from his bed and placed in custody at 11:30 p.m. on March 5; that he was interrogated in relays by prosecutors and their aides, local police and county detectives, as many as seven being present at one time, all through the night, relieved only by his being taken to various places in freezing weather with only a T-shirt on . . .; that he was given a light breakfast, stripped, and examined by a doctor and questioned repeatedly until 10:00 a.m. on March 6, when he broke down completely and cried and asked for a Catholic priest. . . .

Smith subsequently tried to release the priest from his confessional vow, and asked that he be sworn and testify to what Smith had said to him. But no one can release a priest from his confessional vow; and the priest declined to take the stand. Smith asked that a truth-serum test be administered. The State agreed, and psychiatrists were brought in. Under the influence of sodium amytal Smith babbled on and answered instantly and unambiguously all the questions he was asked. Although he made statements damaging to himself—yes, he admitted, he had tried to seduce Vickie—he said firmly and repeatedly that he had *not* killed her. The tape, for reasons unknown, was erased, and the psychiatrists' notes were not ruled admissible at the trial.

Smith swore he had, from exhaustion and pressure, invented the entire disjointed story he had given to the police, "not thinking anyone would believe it." Now, at the trial, he gave a very different story. Yes, he had picked Vickie up at eight-thirty or eight-forty, and yes, she told him not to drive straight home because her sister must not see her in the car alone with a boy. (An implausible story, though it was not contested at trial. Surely Vickie would get into greater trouble at home by letting Myrna walk all the way to the Nixons and back without Vickie, than by letting her

sister see her in a car?) Vickie, he said, told him, on hailing him, that she had something she *must* tell him.

They arrived at the sandpit at about eight-forty-five. Smith now said that Vickie told him his wife was playing around with another man; that he became enraged, slapped her hard on the face, and told her to walk home. She opened the door of the car, went out and ran down the road. Smith paused a few moments, then started to back out of the pit. But he heard "a commotion" down at the corner, and discerned Vickie returning, with another man. Smith grabbed a baseball bat from the back seat, to be used if necessary "for protection." When the couple came closer, he saw that Vickie was leaning weakly against Don Hommell, bleeding from a scalp wound. Smith offered to take her to a doctor and she got into the car. Hommell, in a rage, dragged her from the car across the passenger's seat, and her head fell against Smith's pants. (Her gloves, if they came off at that moment, fell exactly where they were subsequently found.) Hommell, said Smith, was renowned for his violent temper, and considered Vickie his girl; so, Smith said, without further argument he drove home.

Later, on his way to pick up Gilroy, Smith continued, he spotted Hommell parked in downtown Ramsey. He pulled up and asked how Vickie was. "Don't worry about her," Hommell said; adding, "If you mention my name or in any way implicate me, I'm going to get your wife and baby." It was because of this threat against his family, Smith told the jury, that he invented the particular story he gave to the police.

Hommell swore he had not seen either Smith or Vickie on the night of the murder. He flatly denied Smith's claim that Vickie had been his girl friend. But under cross-examination he admitted having been out with her on ten different occasions.

Smith's story was roundly denounced at the trial by the prosecutor. If Smith had been scared of Hommell, why, when brought in by the police, had he said, "If you want a fall guy, why don't you get Donald Hommell?"

Smith's defense at trial concentrated less on Smith's own disavowal of his earlier statement to the police than on certain objective difficulties in the prosecutor's case. Outstanding of these was the coroner's evidence. If one is to believe the State's own expert, who fixed the time of death (instantaneous) at midnight—"give or take an hour" —and the evidence that Smith was at the sandpit not later than nine-thirty (as regards which there were abundant witnesses), then as a matter of fact he simply could not have killed the girl.

Judge O'Dea, however, held that the exact time of death was hard to fix, and that the jury could, in effect, make up its own mind when the murder happened. To the relief of the prosecution, the coroner came back in to say that death "might" have been earlier because the coldness of the night would have distorted his original analysis. Smith's lawyer neglected to ask "how much earlier." Even one hour earlier—ten p.m.—Smith still couldn't have done it. Ought the coroner to have testified that Vickie died at midnight, "give or take three hours"? What are coroners for, if not to be precise? Stomach-content analysis had not been made, else the time of death might have been conclusively established. The jury evidently decided that the doctor (although he had performed hundreds of autopsies) wasn't to be taken literally when, originally, he placed the murder about midnight.

Another difficulty. It was conceded that Smith could not have picked up Vickie before eight-thirty-five at the earliest. It took him a few minutes to drive to the sandpit, just how long is disputed (the distance is two miles; it took me seven minutes to drive the distance; the road is tortuous). Smith claims he did not arrive before eight-forty-

five because a bulldozer doing road work temporarily blocked the road. This allegation could have been checked and contradicted by the State. The State did not do so, which means that under the rules of evidence, the burden of proof being the State's, it must be accepted as true.

Smith never deviated from his claim to have arrived home before nine, a claim backed up by his wife. He certainly could have not arrived much later than that, because he telephoned Gilroy's house at nine-ten, after removing a pair of pants, putting on another pair, going out to the kerosene tank, climbing up on the fence, filling the tank, and tinkering with the stove. In order to reach the trailer by nine, he had to leave the sandpit by eight-fifty-five. The State's charge is, in effect, that in the space of fifteen minutes—eight-forty-eight—fifty-five—Smith: 1) chatted with Vickie, 2) tried to make love to her, 3) progressed sufficiently far to leave tooth marks on her breast, 4) frightened her, 5) pursued her 334 feet down the road, bad ankle and all, 6) cut her head open with a baseball bat, 7) tossed the bat away a distance of 160 feet, 8) brought her 364 feet back to the sandpit, 9) dragged her up to the top of the mound sixty feet away, and 10) killed her with repeated blows from a heavy boulder. Aside from the extraordinary dispatch with which all this would have had to occur even if it had been carefully rehearsed by both parties, the question does arise: doesn't it strain the bounds of credibility that an essentially phlegmatic young man, of nonviolent habits, would so far lose control of himself, in the space of a minute or two, as to murder under such circumstances a fifteen-year-old girl he hardly knew?

Another objective problem not raised at the trial becomes apparent from a close examination of the situation. The blood-soaked scarf and hank of hair were found 360 feet from the body. The hank of hair was small, but large enough to suggest a scalp wound that must have bled profusely. Yet there was no trail of blood from that point

back to where the body lay, 360 feet away over frozen ground that was carefully examined by numerous policemen. That means the killer either carried her fastidiously from Fardale Avenue to the sandpit in such fashion as to leave no blood on the road; or that she was hauled away in a car. Vickie weighed 120 pounds, Smith 150; so that it is unlikely that he would have elected to carry her that distance. (Remember: he was in no hurry. If he returned to the trailer at nine-thirty or ten-thirty, it would not have made any particular difference to a soul.) He would presumably have used the car. Why were there no bloodstains on the right front seat? Or in the back? Or trunk? Or other than on his pants legs? And anyway, if he had to run back to fetch the car, just how far can one stretch the distance a man can travel, or the number of things he can do, in a period of fifteen minutes?

Another item overlooked at the trial was Vickie's clothes, which were shot through with minute bone chips. The killer had to stand very close to her to use a fourteen-pound boulder so accurately. Small bone chips are highly tenacious. A careful examination of Smith's clothing failed to reveal any bone chips whatsoever.

As regards the state of Vickie's clothing, the State was successful in imposing on the jury a logical fallacy. Vickie's sweater was hauled up, and her bra pulled down. But the State insisted that Vickie had run a long way before her initial injury. If Smith had pulled up her sweater in the car, as alleged, two or three running steps, let alone the hundred steps required to take her to the spot where she was allegedly caught by Smith with a baseball bat, would have been enough to drop a loose cardigan back into position (the buttons of her sweater were still done up). Vickie's disarranged clothing suggests that she struggled with her assailant immediately before she died. The State did not allege any such thing. The timetable, stretched already to the breaking point, hardly permitted a twilight struggle at the top of the mound.

No significance was attached at the trial to the location of the bloodstained gloves, discovered sixty-one feet from the body. There is no apparent reason for the killer to have taken them off the corpse and placed them on the road. Presumably, then, the blood on the gloves came from Vickie's scalp wound. She must have tried to stanch the flow of blood with the gloves. Smith said at the trial that he saw her returning with Hommell. The point at which Hommell allegedly dragged her from the car is in the immediate vicinity of the point where the gloves were in fact found—the gloves could, as noted, have been yanked off her hands while Hommell was pulling her from the car. If Smith had clobbered Vickie with a baseball bat on Fardale Avenue as alleged, it is unlikely that she would have been in condition to stanch the flow of blood with her gloves. The gloves tend to corroborate Smith's otherwise implausible story.

Smith said he told Hommell during their brief conversation in Ramsey on the night of the murder just where he had discarded his pants. The woman who occupies property across the road from which Smith claimed to have thrown the pants (beside a bridge, halfway between the murder site and the trailer camp) swore at the trial that she had seen Hommell rummaging there the day after the murder. The pants were later found spread out near a well-traveled road, a hundred yards away from Smith's mother's house. Did Hommell find them, and leave them in the other location, thinking to discredit Smith's story, and make sure they would turn up? If the witness was correct (and she identified Hommell in the courtroom), then Smith's story about talking to Hommell on the night of the murder is proved, since Hommell otherwise would have had no reason to be there.

Hommell was absent from the pharmacy where he worked at the time Smith was at the sandpit, and was seen by—and acknowledges having seen—Myrna Zielinski driv-

ing at "about sixty miles an hour" shortly after nine. Yet Hommell later said he was at Pelzer's Tavern (five miles away) at nine-fifteen and that he was seen there by Pelzer or his wife and another member of the Smith set, Charles Rockefeller. After the trial, after Smith had been convicted, Pelzer executed an affidavit to the effect that he had obliged Hommell by saying he had seen him there at the critical period; that actually Hommell hadn't been there at all. In a subsequent affidavit, Pelzer said that Rockefeller was not at the tavern when Hommell said he was, that Rockefeller left at seven-thirty that night and did not return.

New Jersey law provides that first-degree murder must either be "premeditated killing" or felony murder. The State tried to get around the question of murder by charging Smith with a felony murder. But Judge O'Dea ruled this argument out, on the grounds that the condition of Vickie's clothing, and her physical condition as disclosed by the autopsy, ruled out a hypothesis of attempted rape.

That left only premeditated murder, to justify a first-degree conviction and the electric chair. It is incorrect, in legal terms, to suppose that premeditated murder is only the kind of thing Oswald was guilty of—ordering the rifle months ahead of time, studying the vicitim's itinerary, and lining up the circumstances for maximum convenience. According to New Jersey law, one can theoretically intend a murder in one second, and commit it the next ("No length of time need intervene between formation of the purpose to kill, and its execution"). One crucial distinction appears to be murder as a reflex action: murder in self-defense would be the most obvious case in point. Less obvious, but still generally classified as an unpremeditated murder, is murder in response to provocation by the victim irresistible to the man provoked. The provocation in question must be offensive rather than defensive. If a gentleman tries to seduce a lady, and she declines to go along, that is not a

provocation which justifies him in killing her other than at the risk of conviction for a premeditated murder. If, however, the lady suggests the gentleman has been cuckolded, that is a provocative statement, and any lethal reply by the gentleman—in a fit of blind rage—may be classified as murder in the second degree. The jury was not invited to ponder these distinctions. Felony murder having been ruled out, the jury had to know that it was not the case that Smith had been provoked into insane action. Assuming he had actually killed the girl: is it more reasonable that he did so unprovoked than provoked? Murder resulting from a "wrongful act or insult" is a mandatory second-degree murder. Under the law, any doubt as regards the question inures to the benefit of the defendant. In which case the jury could have found him guilty in the second degree, and he would have received a life sentence. They found him guilty of a premeditated murder of Vickie Zielinski, by simply "inferring" intent "from the nature of the mortal blow," after a mere two hours of deliberation on an extraordinary complex case that had lasted two weeks.

Smith settled down at the Death House to initiate a series of appeals, all of which have been unsuccessful—except those that asked for a stay of execution pending the adjudication of the incumbent appeal. The first appeals concentrated on discrepancies uncovered in the evidence given at the trial: for instance, Pelzer's *volte face* on the question of Hommell's alibi. Denied. Gradually, Smith turned to matters of law rather than fact. So much so as to dismay some of his friends, a diminishing band, who would have preferred, somehow, to see him devote his long weeks and years in the death cell to constructing a compelling case against the killer—whoever he was. (Early in our correspondence I raised the question. *"You say in your letter,"* he replied, *"that I am convinced of my innocence and, under the circumstances, I must have 'a strong case against somebody?' You end this statement with a question*

mark. I am not sure of your meaning. As for my innocence, it is not a matter of 'convincing' myself, I know!!") But Smith turned cool; cool especially on the matter of putting his finger on the killer.

And, within a very short period, he was left with very few friends. His mother emptied her purse in his behalf, and could no longer pay legal or investigative bills. A. D. Nicol, the private eye, was paid $100 a week during the eleven weeks preceding the trial. Convinced of Smith's innocence, he never stopped working for him. Nicol is a middle-aged Scotsman, a prodigious worker addicted to meticulous detail, who drove four thousand miles merely to interview people who had known Smith. He took the job, as did Smith's trial attorney, believing Smith to be guilty, but believing also that he was entitled to representation. Within a very short period, they both believed him innocent. Nicol is a diffident man, noncombative in his views. Even so, after the conviction, in a conversation with the prosecutor, he listened to Mr. Calissi say: "I would stake my own life that Edgar Smith is guilty."

"I would like to say, with all due respect," Nicol said, "that I would stake mine that he wasn't guilty." His mind has never ceased to turn on the subject. He is by no means convinced that Hommell was the murderer; and as recently as the late Spring of 1965, he bared to me his own hypothesis, which only the laws of libel prevent my disclosing. He does believe that Smith last saw Vickie with Hommell.

In short order, the dramatis personae disbanded. Smith's wife went West with her new husband, and renamed her child. Mrs. Zielinski, Vickie's mother, divorced Zielinski, charging him wth unspeakable conduct and brutality toward her and her daughters. Hommell took odd jobs. A year ago he was extradited in Florida, after the American Civil Liberties Union took the complaints of fifteen boys at a Maryland Reformatory who charged Hommell with brutal and sadistic treatment of them. Char-

acteristically, Smith gave me that information by sending along a clipping from a New Jersey paper without comment. I replied that the arrest was of considerable interest, even though, in conversations with Nicol, I gathered that he himself was not convinced of Hommell's guilt. *"No,"* Smith replied, advancing one of his measured thoughts, *"Nicol did not think Hommell was guilty. Then again, no one ever said he was guilty; the only thing I said was that I left the girl with him. As for Hommell's present troubles, I think they are more interesting than useful. Being entirely realistic about things, I would suppose that the only real value to me of Hommell's difficulties would be if a new trial were granted; then I could very well raise hell on the question of Hommell's credibility as a witness for the prosecution. (Wow! What a great title for a book or a play—* Witness For the Prosecution. *Such imagination!)"*

Smith's letters are obstinately optimistic concerning his ultimate vindication—at least legally (he never talks about getting his hands on The Killer; or at least not to me.) His imperturbability, a word he has come to dislike, I found out after twice using it, is sometimes understandable, sometimes less so. (July 26, 1963:) *"It is my sad task,"* he began a letter in a style so often arch, *"to advise you of the denial of my appeal. The denial came on 24 July [1963] via a 2-1 vote."* But quickly the note of optimism. *"However, for the first time, a Judge saw things my way."* He tried a little later (November 4) to persuade his former wife, through a volunteer attorney out West, to execute an affidavit reconfirming the facts on the record—that the police had pretended to her, on the morning of March 6, that Smith was being detained merely to answer questions concerning another suspect, and that therefore she did not need to worry, as she was disposed to do, to summon an attorney in his behalf. But his wife now pretended she had never before heard of Edgar Smith; before the affidavit could be presented, she invited the attorney, curtly, to leave her house. *"The information* [from out West], *unfortunately,*

was not what I would have liked to have heard. I suppose it's best to be philosophic about my problems, when one gets to the bottom of the ladder the only way to go is up. You can believe''—a rare relapse into melancholy—*''I have now reached the bottom.''*

And then the rejection by the Supreme Court (February 20). *''From what I hear from Washington, Justice Douglas voted to give me a full hearing. Four votes are needed. Apparently Justice Douglas was the only one to see things my way. Bless his liberal heart!!''*

And on the 25th of March, when a colleague of mine expressed concern over an execution date fixed for the 27th of April: *''Don't worry about that April 27 date, a stay is more or less a formality.''* And changing the subject quickly to more serious matters: *''Do me a favor, will you? Call me something besides Mr. Smith; no one else does except Mr. Buckley. Maybe there's some psychological significance, but I feel uncomfortable when people call me Mr. Smith. I prefer anything else, Ed, Smitty, even Edgar. To what might be called the in-group, I answer most often to Igor.''*

(On July 7th:) *''I have just learned that the State Supreme Court has rejected my appeal. Again, I am surprised!''* (Smithese for: I am not surprised.) *''Perhaps by the time you return from celebrating Barry Goldwater's victory in San Francisco, I will be able to give you a positive statement as to my future plans.''* On July 13th, his buoyancy was visibly diminished, though finally it surfaced. *''I have received the New Jersey Supreme Court opinion on my last appeal; it is even more abrupt than I had expected it to be. I was surprised by the Court's reliance on inference and supposition—all in the State's favor. I have, in the past, been willing to accept the various Court*

• The former Mrs. Smith has since executed an affidavit tending to confirm the facts as alleged by Edgar Smith.

decisions with a reasonable degree of equanimity; this time I find I am rather unhappy. However, what is done is done."

For a year, he believed that the Supreme Court's decision in *Mapp vs Ohio*, which defined the rules of search and seizure in such a way as to flatly illegalize the means by which the State of New Jersey had got evidence from Smith concerning the baseball bat, the pants, and Vickie's school books, would be his deliverance. The question was whether the Supreme Court would rule that its decision in *Mapp* should apply retroactively, i.e., that prisoners whose plight was traceable to a violation of these rules should be given a retrial. Smith was jubilantly confident that the Supreme Court would so rule in the Spring of 1965—and confident that the New Jersey prosecutor was ignorant that the Supreme Court had accepted two test cases which would require it to come to a decision on the matter.

Nothing doing. (June 9:) *"I would suppose you [have] read that the Supreme Court has held Mapp to be non-retroactive. They really surprised everyone this time. It makes my problem somewhat more difficult, but I've managed to survive worse setbacks."*

His optimism sometimes has stemmed from his confidence in his own superior knowledge if not of the law, at least of legal tactics. To his dumb amazement, on one occasion the State missed its deadline for filing a brief in opposition to his own. The rules on the matter are very strict—if no brief in opposition is filed, a Court is entitled to take the position that the petitioner's point is unopposed, in which case it is, as a rule, automatically conceded. An entire month went by. *"The State filed, without explanation, a reply brief on January 21, one month late. I filed a Motion the same day, calling for rejection of the reply [on the grounds of its lateness]. Actually, it might be better in the long run if the reply is accepted. My humble opinion is that the reply is the worst brief I have ever seen."*

The Supreme Court, once again, turned him down. (February 3:) "*Throw me a parachute,*" he wrote me to Switzerland. "*—I've been shot down by the Warren Escadrille. The decision came Monday, the 1st.*" And then, like a composer facing an immense organ console, meditating the harmonic combination best suited for the next desired effect, "*It may take a few weeks to determine which way, legally speaking, I will go next. It appears that my best bet will be to hang up my appeal in some manner*"—he meant delaying action, for the sake of delay—"*in order to give the Supreme Court time to reach its decisions.*" (He was waiting for the Court to declare itself on the retroactive application of *Mapp.*) "*Of course, delaying actions aren't ethical—but, then again, I'm not a lawyer, am I? . . . Perhaps this would be a good time to ask the County Court to correct some of these minor errors in the record. . . .*" .

By March 1st he had decided on his strategy, which he communicated shortly after writing that he had secured a Court order authorizing me to visit him. "*After a month or so of hard work, mostly trying to decipher Earl Warren's* [opinions], *I'm beginning to see a ray of hope. All I have to do now is to convince one of the lower courts that the Supreme Court means precisely what it says; if I can do that—no mean task—I may wind up visiting you.*"

On March 17, 1965, almost as if to interrupt Edgar Smith in mid thought, Judge O'Dea set an execution date—April 28. He appealed to the New Jersey Supreme Court to stay the execution, pending his appeal. The New Jersey Courts delayed. . . . At the last minute, Associate Justice Brennan of the Supreme Court ordered the stay of execution (which Smith sent me, marked "No need to return"). This time he had been visibly shaken.

(April 18:) "*My predicted schedule is a fait accompli. Mr. Justice Brennan ordered the stay of execution on Good Friday, which is in itself singularly appropriate. I will*

now sit back and bide my time until the end of the [Supreme Court's] term, the 21st of June. Then, with all the Court's decisions at hand [the Supreme Court makes some of its most important decisions at the end of its term, and was due to rule then on the applicability of Mapp], I will be able to file my petition on latest authority. That petition will be acted upon the first Monday in October. If the Court then declines to take jurisdiction, off I go to the District Court. All of which means you can keep aboard your boat, head for Nassau and the Out Islands, and forget about Young Smith for the next six months."

He did not, as was his habit, sustain the levity:

"Bill you know as well as anyone that I've never been one to grouse about the manner in which my case has been handled in the courts, but today I'm peeved. Back in 1958, my lawyers tried for two days to get a stay [of execution] from one of the State Courts, but couldn't even get the time of day. Finally, with twenty-four hours to go, they managed to find a Federal Judge to issue a stay and take jurisdiction away from the State Courts. Within an hour, the State Supreme Court and the Attorney-General both issued stays, claiming prior jurisdiction. The Federal Judge released the case to the State, after he had finished chewing out the Attorney-General for, as the Judge put it, 'playing games.' Well, 1965 was nearly a repeat performance.

"After filing in the State Court for a stay, I wrote the Chief Justice three letters, explaining the exigency of my situation and requesting a speedy decision. I waited eleven days for a decision usually made in one day, and then heard a story to the effect that the Court was going to sit on the application until the last possible moment, then deny it. So being prudent where my skin is involved, I wrote to the Court and the Attorney-General, telling them I'd wait three more days before asking the Federal Court to again take jurisdiction. Mirabile dictu, *I received a decision the following day.*

"Frankly, my friend, things were a bit close for a while; I had the suspicion I was batting a sticky wicket. You can bet your best ski boot that the State isn't going to throw any parties for Justice Brennan this month.

" 'Tis time I ceased bending your ear. Will keep you posted, always and endlessly (one hopes)."

Edgar's mother gave me a picture less composed: "At the time I arrived for my visit [with Edgar] he did not know about the stay. It was my pleasure to tell him. He did not believe it was true until it came on the noon news."

Smith doesn't write only about his legal problems. In prison he has read as widely as his prior commitment to the law will permit him. He has taken correspondence courses from several universities, in several fields, and is also an avid television viewer. (" *'Tis time for me to settle back for another evening of TV. Tonight is educational TV night, I watch the one and only* Beverly Hillbillies. *Late at night, eleven to one, I watch Johnny Carson.*") He spotted Dwight Macdonald one night, describing himself as a "conservative anarchist." *"Our 'conservative anarchist' is a real enigma. Perhaps some Sunday afternoon the Hayden Planetarium could devote a special show to attempting to depict the various seasonal positions of the stars in the liberal galaxy. . . ."* He takes a modest pride in his scholarly achievements. (December 8, 1963:) *"I thought you might care to know that I have taken and passed the first of two tests given by Mensa.* They advertise in the classified section of N.R. I am also carrying a ninety-eight percent average in the Accounting and Economics courses I am taking from Penn State University. I will complete the first semester in about three weeks."* And on another occasion (August 20, 1964): *"Thought you would be interested in my college grades to date. They are: Accounting 1 and 2, six semester hours,*

* The organization of top I.Q.'ers.

final grade B; Business Organization, three hours, final grade B; European History (Renaissance to Waterloo), four hours, final grade A; Advanced Rhetoric (incomplete), three hours, A average. By the way, for my final exam in Rhetoric, I wrote an essay about BG [Goldwater] and the press." And on January 5, 1965, acknowledging a book I sent him at Christmastime: "*. . . I guess I'm something of a nut on World War II. Once I get going with all the maps and things I withdraw from the world for days at a time. By the way, did you know that Kosygin was one of the planners of the industrial move to the East in 1941?*"

And sometimes, in his letters, just acute high-spiritedness. "*P.S.*." (July 22, 1964:) "'*I see* National Review *is now listing its zip-code number. A sign of moderation?*" (September 16:) *Yesterday I received* National Review. *Who had the bright idea for that section printed on blue paper? I almost went blind trying to read it. (Don't I have a lot of nerve for one who is receiving a free subscription?)*" I replied: "The blue paper was a catastrophe. The printer simply substituted his shade of blue for the blue we had designated. We are flatly refusing to pay them for the supplement, so that I may end up in jail myself. You would, of course, write to me?" And a reply: "*My opinion is that you'll have to pay for the blue paper. Being in interstate commerce, you cannot discriminate on the basis of color—including the various shades of blue. If you go to jail, I'll write—provided you maintain a modicum of imperturbability.*"

I thanked him, last December, for sending my wife the Museum of Modern Art's annual calendar. (December 18:) "*Glad you liked the calendar. I would have liked to have done more, but circumstances made it impossible. Perhaps I'll remember you in my will, and leave you my collection of* National Geographic *maps.*" I thought I saw a wayward trace of bitter-sadness here, and tried to move fast to cope with it, and lead it back to where it normally slumbered.

"Thank you for promising to remember me in your will [I replied]. Since I am ten years older than you and engaged in activities far more perilous than yours, with perhaps a single exception I should think it highly unlikely that I shall reap any such harvest. But I thank you for the thought." He did not acknowledge the letter, but several months later alluded to it. *"Good Lord!"* he began, with his conventional tushery. *"How did you get shanghaied into that election business?"* (I had declared my candidacy for Mayor of New York.) *"Did you ever stop to think that through some strange twist of fate you might be unlucky enough to win? It isn't likely, but the possibility is frightening. At least you have the editors of the* Times *pulling for you to come out safely in the end. As for myself, I'm almost afraid to send you a contribution —it might help. Oh well, if nothing else, I can now agree with you when you say you have as many problems as I do."* (June 25, 1965)

The final appeal of Edgar Smith will be based on three points. The first is that the proceedings by the police against him on March 5 and 6 were inquisitorial rather than accusatory: that inordinate pressures were put on him, so much so as to cause him to say anything at all rather than endure the agony of further questioning, further harassment, further fatigue. The second is that Smith was denied counsel at a moment when the proceedings had clearly progressed beyond the investigative point, on over to the accusatory point. The third is that incriminating information was got from him without regard to his rights under the Fifth Amendment.

The legal fight, provided the money can be raised to pay a lawyer's fee, will go, almost inevitably, to the Supreme Court: for the final time. The District Court will predictably have turned down Smith's appeal by the time these words appear in print. The Court of Appeals will hear Smith's appeal and dispose of it by Winter or Spring of 1966: probably unfavorably, considering the flux caused by

recent Supreme Court decisions, and the conventional indisposition of a lower Court to apply Supreme Court rulings that are considered if not elusive, at any rate socially disruptive. If *Escobedo vs Illinois,* for instance, is to be applied retroactively, will our jails suddenly empty? And will new trials, some of them many years after the crime, need to be conducted? This spring the Third Circuit Court of Appeals, ruling on the prisoner Russo, who occupies the same Death House as Smith, took the bits and pieces of legal flotsam washing about in the legal seas and attempted to lay down a firm position. I asked Smith, at the same time, to explain to me the meaning of the Russo decision (which will be tested in the fall, with consequences for Smith, among others), and he wrote me as follows:

"The Third Circuit decision at issue is a new and truly far-reaching holding only insofar as it represents a sort of amalgamation of all past State and Federal Court holdings. In combination, these holdings add up to far more than they do when considered separately. In all fairness to the Third Circuit, one must note that each statement in this recent decision is supported by a previous decision of some other court.

"The decision deals with two specific issues. The first is the factual question of when the right to counsel obtains; the second is the question of whether the right depends upon a request.

"1) The prevailing standard for judging the point at which a suspect becomes the accused, and the right to counsel thereby attaches, is Escobedo vs Illinois. In simplest terms, Escobedo holds that the right obtains when the crime is no longer 'unsolved,' when the suspect is in custody, and when he has not waived his right to counsel. This is a difficult series of circumstances for an appellate court to determine in retrospect; it might have been better to say 'when probable [prima facie?—W.F.B.] cause to arrest is present.' The problem of determining when the

suspect becomes the 'accused' is akin to determining when a book or movie is 'obscene.' In both cases, everything depends upon the particular circumstances of a given situation.

"Example: If the police have a confession from the suspect's partner, implicating the suspect, and there is independent evidence placing the suspect at the scene of the crime at the time of the crime; it may then be said that the crime has been solved, that the suspect has become the accused, and he is entitled to the assistance of counsel. This may not mean the police have sufficient evidence to convict, it simply means the police have probable cause to arrest; and that continued interrogation in the absence of counsel is impermissible, since the obvious purpose of that interrogation is to secure from the mouth of the accused the necessary evidence to convict. (Wretched phrasing!) Nothing prevents interrogation if the purpose is to solve a crime, and counsel at this stage is not a constitutionally secured right. However, when the interrogation is for the demonstrable purpose of eliciting a confession which will complement other evidence and assure a conviction, the constitutional right to counsel obtains. Finally, the police may interrogate any person at any time if that person has been advised by counsel, or has waived that right, and still wishes to 'bare his breast.'

"2) Having determined that the petitioner had become the accused, the Third Circuit turned to the question of whether their failure to request counsel militated against a finding that they had been deprived of counsel, and concluded that it did not. Citing the Supreme Court decision in Carnley vs. Cochran *(1939), and a host of subsequent Federal and State decisions, the Court came to the obvious conclusion that the right to counsel is secured by the Constitution, not by any request. If the accused has that right, it is his whether or not he has asked for it; if he does not have the right, a request does not give it to him. This par-*

ticular holding was taken from People vs. Dorado, *California Supreme Court, Jan. 18, 1965. The State appealed and the Supreme Court refused to review June 2, 1965. The Ohio Supreme Court ruled to the contrary but the United States Supreme Court reversed that decision May 24, 1965.*

"In all jurisdictions, the right to counsel may be waived. Many State Courts have considered silence to be a waiver, but this has never held up in the Federal Courts. The Federal Courts hold that the waiver must be knowing and intelligent, that to waive the right the suspect must know first that he has the right. Hence the recent holdings that police must advise suspects of their rights, and that any waiver must show that the suspect was fully aware of what a waiver would mean. For the Courts to hold otherwise would be to favor the habitual criminal over the first offender. The former 'knows the score' and is quick to request counsel; the latter is often confused, intimidated, or simply ignorant of his rights. Thus, in determining the intelligence of any alleged waiver, the suspect's prior record is a significant factor.

"Additionally, the Third Circuit Court reasoned that if a person has the constitutional right at trial, to counsel, notwithstanding his failure to request counsel, he should not be required to request counsel when the constitutional right obtains prior to trial. After all, why should a right depend upon a request at one time but not at another?

"I might add that many police officials argue that a 'warning' will prevent them from obtaining confessions from those suspects who desire to confess. This is ridiculous. If a suspect truly desires to confess, a warning will not stop him. On the other hand, if the confession is obtained solely because the suspect was ignorant of his rights and did not know he could remain silent, it should be thrown out. And this is what the Third Circuit has done.

"I could write a hell of a lot more, but it's getting late and I'm beat. Hope this rather sloppy and superficial rundown gives you some idea of what the decision was about. It's not Magna Carta, far from it, but it does help me."

It is only natural for laymen such as myself to wonder why a man who can write such expository paragraphs as these should need another man for a lawyer. One recalls, from time to time (without ever fully understanding it), the old saw about the man who serves as his own lawyer having a fool for a client. The key here is Experience! How very necessary it is; and it's something Smith does not have. *"Could you give me the benefit of your thinking, as to how I might best proceed,"* he asked me last March (March 28). *"I hate like hell to put you to a lot of trouble on my account, but I have to plan ahead. . . . Quite frankly, Counsellor Smith is in somewhat of a quandary. Do I compromise my not too abundant principles and prepare the abject, bowing and fawning type of brief the State Courts have come to expect (prefer?) from indigent lay appellants? Or do I stand by what I know is right ('In your heart . . .'), and give the Court a lecture on the State's basic responsibility to uphold and protect the federally secured rights of its citizens? The first course is wiser, the latter the more honest. It's quite a problem in strategy. If I had been trained at 'Foggy Bottom,' I'd probably try to walk a thin line down the middle, and wind up losing on both sides. Oh, for a return to the simple days of my misspent youth!"*

Smith never once asked me to help him raise the funds to retain a lawyer. Our single discussion of his needs centered on the purely mechanical problem of replacing an inadequate and slow prison typist with a professional legal stenographer accustomed to the proper typographical façade; and to the irksome problem of supplying the dozens and dozens of copies that need to be furnished

when complicated appeals are filed. I have never known a less importunate man, for whom the least favor is taken as a charitable act of great magnitude. *"It is very kind of you people,"* he wrote a short time later, *"to take such an interest in my situation."* Much later, when I undertook to get his appeals typed and duplicated: *"I know you are going to suggest that you will have the work done for me. Please, humor me; I am just conservative enough to insist on paying my own way for as long as I can."* I replied that I would purchase the literary right to the letters he had sent me in return for the cost of duplicating his appeals. His next letter joked about the suggested deal. I persevered. He replied: *"No, I didn't refuse you the 'litprop' in my letters. All I did was deny that any existed, and I still deny it. You'll never realize how happy I am knowing that you have to read my letters, not I. That isn't an opening into which you are expected to insert a compliment. I'm being perfectly candid when I say I haven't been able to figure out what in hell there is about Smith that keeps you interested."*

What indeed? It has not occurred to him that one can develop a friendship for a man in a Death House; or that a condemned man's friendship can be gratefully accepted. Probably it has not occurred to him because probably he suspects that any such friendships are emotionally condescending, that they are based on pity, or morbidity. I suspect that that is the reason why his natural dignity has always prevented him from emotional self-revelation. Only twice has he exposed himself. I finished a letter about this and that (August 18, 1964) rather impulsively with the sentence, "My God, I wish I could be absolutely certain you didn't kill that girl!" *"My God,"* he replied, *"I wish you could be absolutely certain I didn't kill that girl!"*—but he recovered his composure before even finishing the sentence: *"But you know what they say about death and taxes. I think, for now, that I am satisfied that you aren't certain that I did kill her.*

Besides, you really think it would do any good for me to tell you I didn't? Would that convince you? Disclaimers of guilt are a dime a dozen around this place.'' And then he was Lawyer Smith again: *''From an idealistic (sic) point of view, if you are uncertain about my innocence, it follows that you must be uncertain about my guilt, as well, and I am entitled to the full benefit of your doubt. Where is your conservative belief in established judicial principles?''*

The other time I riled him, he did not recover until the end of a long paragraph. I had written him that God was apparently in the subways, to judge from graffiti I had come upon that morning. ''God is Dead—Nietzsche,'' someone had written in chalk. Under which had been scrawled in block letters, ''NIETZSCHE IS DEAD—GOD.'' I then made a second comment, coming apparently too close on the heels of the first, about his imperturbability. *''I had not intended to write again so soon,''* he began glacially, *''but I am, quite frankly, somewhat disturbed by your very apparent misapprehensions as to my state of mind. Your references to my serenity, imperturbability, etc., impute (sic) that I am some Buddha-like anachronism, fast approaching Nirvana. Tell me—does the fact that I am in the Death House mean to you that I should be perpetually atop a soapbox, shouting my protestations to a cold, cruel, unhearing world? I assure you, my friend, if I thought soapbox oratory would serve me any good purpose, I would climb onto the closest box handy, and put George Wallace to shame. The fact is that what you mistake for serenity, or an air of detachment, is nothing more or less than the realization on my part of the fact that my situation is not going to be improved by breast-beating and lamentations, however loud or sustained—it can only be changed by and in a court of law. Perhaps my letters should be appropriately tearstained when they arrive at your office, giving them a more pathetically desperate quality. Again, if it would*

do me any good, I would cry you a river—à la Julie London.'' Then, rapidly, the pulse slowed; and Queen Victoria remounted her throne. *''I trust you will not misinterpret the tone of this letter. I was not especially unhappy that you failed to understand my feelings, but I did think it was worth clearing up.*

''P.S. What ever were you doing in a New York subway? You're right, you do live more dangerously than I do—much more.'' †††

(EDITOR'S NOTE: Edgar Smith has no funds to retain counsel, without which he cannot complete the final legal appeals that stand between him and the electric chair. A fund for this purpose has been started: donations should be earmarked ''Edgar Smith Fund'' and sent [immediately] to Mr. James Williams, Treasurer, New York Yearly Meeting of Friends, Oakwood School, Poughkeepsie, New York [a tax-deductible foundation]. Any surplus will be returned after the final disposition of the case. The author's fee for this article has been turned over to the fund.)

Excerpts From the Transcript of First Habeas Argument

TRANSCRIPT ON MOTION

Trenton, New Jersey
May 15, 1961

Before The Honorable ARTHUR S. LANE, USDJ

Appearances: WILLIAM RICHTER and JOHN E. SELSER, for the Relator

WILLIAM C. BRUDNICK, Special Assistant Prosecutor of Bergen County for the State

The Court: Mr. Richter and Mr. Brudnick, was it your intention today to just argue the motion of Mr. Brudnick for striking this amendment to the supplemental petition or do you intend—you have not answered this supplemental?

Mr. Brudnick: I have an answer prepared, sir.

Mr. Richter: It was my thought—I didn't know what the procedure would be—it was my thought, if your Honor pleases, to apply to your Honor before you hear the motion to strike it as out of order.

The Court: To strike the motion?

Mr. Richter: Yes. I was flabbergasted to receive it because I thought when we left your Honor's chambers I thought we were in complete accord and instead of Mr. Brudnick calling and asking for more time from May 15 to June 5, as your Honor had stipulated and we agreed to, this motion was served on me instead.

I don't want to go into the merits of the motion because I think, if I use the term false, I think I will be using a correct term. I would rather use the, I would rather say it is presumptuous. I think it is presumptuous on the Court, even, to have made the motion, and I think your Honor is well aware of what the stipulation was in your chambers that day, and as far as I am concerned, if this motion is ruled out of order, your Honor could either hear

argument today or set it over to June 5. I am at your Honor's pleasure.

The Court: Let me say this. There may have been some misunderstanding on our last discussion, but it was my thought, and I think I initiated the idea that I didn't want counsel on the side of the defendant or the side of the State or anybody involved in this case feeling dissatisfied with the state of the record; that I wanted this record insofar as you gentlemen are concerned to be as complete as you thought it should be. I am not talking about the merits of any of the defenses or any of the points raised by either party. I am not talking about the merits. I just wanted everybody to be satisfied that they had, so far as they were concerned, this record in complete form so that here and later and wherever you may go, whoever takes the initiative of going from here to somewhere else would not be called upon to argue that this is incomplete and this matter really hasn't been heard as yet.

Now, that was my notion, and that is the (4) reason I think I suggested that I would allow an amended or supplemental petition, you see. I asked that it conform or follow the same format as your other petition so we wouldn't have criss-crossing and have to search back and forth, and so forth. I take it that you understood that was the plan.

Mr. Richter: Exactly, sir.

The Court: And you have attempted to follow that?

Mr. Richter: I might add it was your Honor's thought, and I agreed we should expedite this thing rather than start anew, that I had no objection to your Honor picking up where Judge Morrill left off, with the proviso I could amend the supplement and argue before your Honor, and your Honor agreed on that.

The Court: Do I understand this amended or supplemental petition supersedes everything else that you have by way of petition?

Mr. Richter: Yes, and follows the original petition exactly except for the Cassity notes, which have been added.

The Court: In other words so far as I am concerned I can rely on this as representing your (5) entire position?

Mr. Richter: Yes, sir, with the exception, I may say, of one exhibit which is in the original petition which concerns itself with New Jersey statutes. As a matter of fact, the original petition had application for a stay in it originally, but your Honor is absolutely right you may follow this amended supplemental petition as if it was filed anew.

The Court: Now, sir, you don't approve of that idea?

Mr. Brudnick: If I can be heard—

The Court: You may, sir.

Mr. Brudnick: On this, this is exactly what was attempted to be done when Judge Morrill was living. There was initially an application for stay, an application for habeas corpus in which everything that we now have was set forth. The defendant was then asked to file a designation of the record, because nowhere in the moving papers at the time of the application for habeas corpus was there any reference to any of the statements that were made there.

Hence, at the argument on the hearing for habeas corpus, this was pointed out, and Judge Morrill requested that a designation of the record be filed by the defendant and by the State.

The Court: Yes, sir.

Mr. Brudnick: Instead of a designation of the record there was filed something that was called some hybrid designation of the record and/or supplemental and/or amended petition, which consisted of 60 pages, and this is identical, except that he had deleted a couple of pages to which was attached an affidavit by Dr. Cassity, an affidavit by Dr. Policastro setting forth the truth serum tests and how there was a denial of his constitutional rights. Judge Morrill threw it out on his own volition.

He sent it back and said that he wouldn't take it because this was not a designation of the record.

Subsequently, the defendant then moved to supplement and/or amend his petitions which had been consolidated. . . .

* * * * * * * * * * *

Mr. Richter: I don't think there is any point in answering this. (11)

The Court: We are in the home stretch now so far as the presentations, and then I will have the great big task of studying this whole matter and rendering a decision on it.

Now, if he isn't ready, if he wants an opportunity to study the answer you filed now before over-all argument, I will give it to him, and if you return on the 5th, we will have the oral argument, and in the meantime I will have done some work on this petition and your answer and on the record, and I am sure we will be quite a long way ahead of where we are today. . . .

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TRANSCRIPT OF MOTION

Trenton, New Jersey
June 5, 1961

Before The Honorable ARTHUR S. LANE, USDJ

(Appearances as before)

The Court: Before you start, it seems to me you have done quite a thorough job on these moving papers, and it would not be necessary for you to recite all that is here. I think that I would suggest that two or three of the points that you think are the most important, you might confine yourself to that.

Mr. Richter: I was thinking of doing that, Judge. I don't mean to make any formal argument, but what I would like to do, if it meets with your Honor's approval, is to sort of go through the petition and sort of discuss the

thing with you and emphasize the points that I think need emphasis, and that was my intention.

The Court: Yes, sir.

Mr. Richter: Did your Honor want me to speak from here or approach the rostrum?

Judge, at the outset I should like to say that the last time I appeared in the Federal Court to argue the petition in this Edgar Smith matter was before the late Judge Morrill, a year and a half ago, and I should like now for the record to express our deep regret at his passing and for his Honor's due and serious consideration of the matter. I know that, and I know Mr. Hicks joins with me in those sentiments.

I should also say that Judge Morrill did not hold this case for a year and half. I realize that toward the end of his life he was in ill health, but I do understand and appreciate that for a substantial part of the year and a half I think he had given this matter due and serious consideration.

I also know that I believe—and he was awaiting the outcome of some cases from the United States Supreme Court, particularly the Rogers case, and Mr. Hicks here can verify that by saying at one time Judge Morrill had told him he was awaiting the outcome of the Rogers case because he thought it was quite parallel to the Smith case. I mention that to your Honor for what it may be worth.

I think at the last discussion in conference your Honor said that you had no confidential memorandum or notes from Judge Morrill and, unfortunately, his ideas and his thoughts and considerations in the matter passed on with him. So your Honor must take this matter pretty much from scratch, so to speak, and I appreciate your Honor permitting us to supplement and amend our petition so that your Honor will have all the facts before you, and it is a fortuitous decision, because it falls almost in line with what the Rogers case has said, and what the United

States Supreme Court has said is that your Honor should not be limited in any manner. As a matter of fact, your Honor should not have been limited by the trial record itself, because now by the Rogers case you have guidance and your Honor can go behind the record.

The United States Supreme Court says your Honor may hold a hearing de novo if need be to go into the historical facts behind this case. I don't think it is necessary here.

I think if your Honor limits himself to the record, I think that the error, the fundamental constitutional error in this case is so overwhelming that I need not stand here and argue this case at any great length.

Now, if we understand each other, so there will be no mistake about it, we rely solely and wholly upon this amendment and supplemental petition your Honor now has before you with the exceptions that I noted at my last appearance of Exhibit C attached to the original petition, which is the excerpts of the statutes, New Jersey Statutes, which concerns itself with the requirements as to arrest and arraignment, et cetera, and so forth. With that addition, I say we rely solely upon this amended and supplemental petition, and bearing that in mind, I now call your Honor's attention to the answer submitted by my learned adversary, and I know that your Honor has all these papers before you. You probably are familiar with the matter now.

The Answer is as weak as any answer I have ever seen to the petition which we have submitted to your Honor. It consists mainly of a general denial by the Prosecutor. He seems to content himself with a general denial to all that we have stated in our petition. . . .

* * * * * * * * * *

Mr. Richter: Yes. All right.

Now there is one other point I would like to bring in. Mr. Brudnick still says we are restricted to this trial record. I say we are not, and I say the Rogers case now agrees with us that this Court can go beyond the trial

record and it says it very plain here. As a matter of fact, the Rogers case says even if we didn't raise the voluntariness of the confession in the trial court, we can raise it here for the first time and your Honor can hold a de novo proceeding on that assuming for the sake of argument that the lawyer failed to raise the issue of voluntariness in the trial court. Would they tell us that we can't raise it if it deprives this boy of his constitutional (89) rights, even here for the first time, which is not the case. I say it was raised there and your Honor will see the record, and even the State Supreme Court says they would treat it as if it were objected to on every conceivable legal ground.

And it says here on page 14 of the Rogers opinion that, of course, where the issue of coercion is raised, not on direct review in this court but by the petition for habeas corpus in the Federal district court, one alternative method of proceeding impossible on direct review is available. The district court might conceivably hold a hearing de novo on the issue of coercion. So I say that that can be raised here for the first time if need be, and that applies to the truth serum. And I say to your Honor even though it wasn't raised in the State court, if your Honor agrees with our contention that the use of this truth serum was unlawful and if they suppressed evidence in obtaining this truth serum examination, I say to your Honor we can raise it here for the first time and, if necessary, hold a hearing de novo, although the United States Supreme Court said your Honor should not have to do that if the (90) historical facts—and historical facts means what it says, historical facts don't mean in the trial record, it means the facts as they existed; if the historical facts bear out our contention, I say to your Honor that even without holding a de novo proceeding, you can send it back to the trial court and put it upon them, because the Court, the United States Supreme Court says that it is the State's responsibility. It is the responsibility of

the trial court to protect this boy's legal and constitutional rights, and if they didn't do it, you don't have to do it at this late stage of the proceeding, but you can do it. And I say that is the Rogers case.

As far as truth serum is concerned, he is belittling the truth serum. There is a case now pending in the United States Supreme Court, Townsend. Mr. Hicks handed me this, and we have a letter from the Clerk of the Court saying they will probably decide the Townsend case sometime in October. If your Honor would like to have it, I don't think it is all-controlling. It may be contributing to the over-all issue, but if the weight that we must give to the truth serum is at issue, it was weak, look to the Townsend case, but we don't question whether it was (91) admissible or not. We question its unlawful use. We question its suppression. That is the very point we raise, as I say to your Honor we can go into it in the this court if need be, but your Honor need not do that, in accordance with the Rogers case.

I should like to leave this on the Townsend issue and the notes on the truth serum, and say to your Honor this is all we have. He says he testified to the same at the trial court. I don't know that. I have never seen or heard this truth serum, as I recall to your Honor, and I don't know if it is the same, and I am vitally interested in hearing this tape recording which he, to this very day, hasn't denied exists, nor has he denied there is a full and complete transcript of this truth serum. I am vitally interested in hearing this, and I think perhaps the Court should be, too.

Thank you.

The Court: All right. Thank you, gentlemen.

(Adjourned at 5:08 P.M.)